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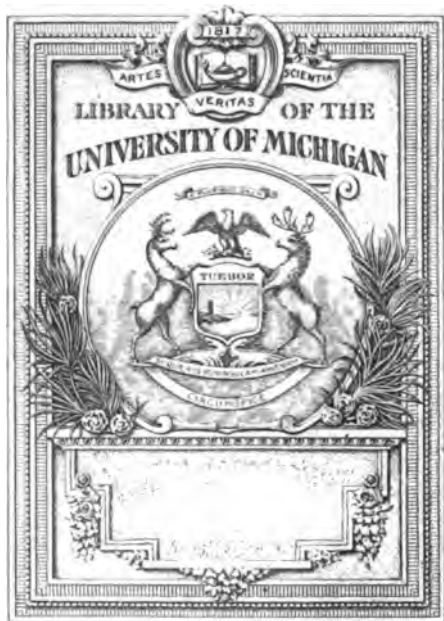
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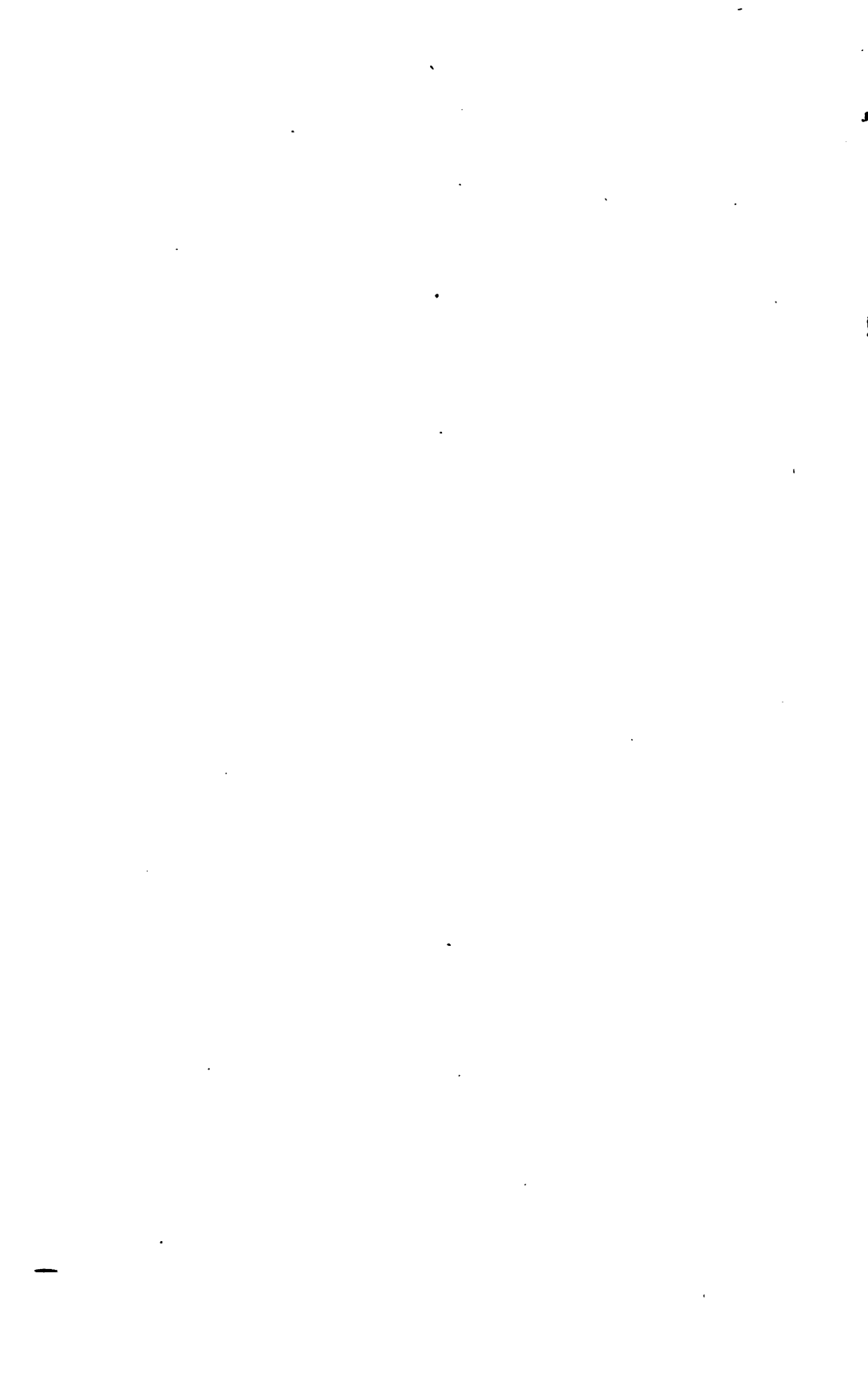
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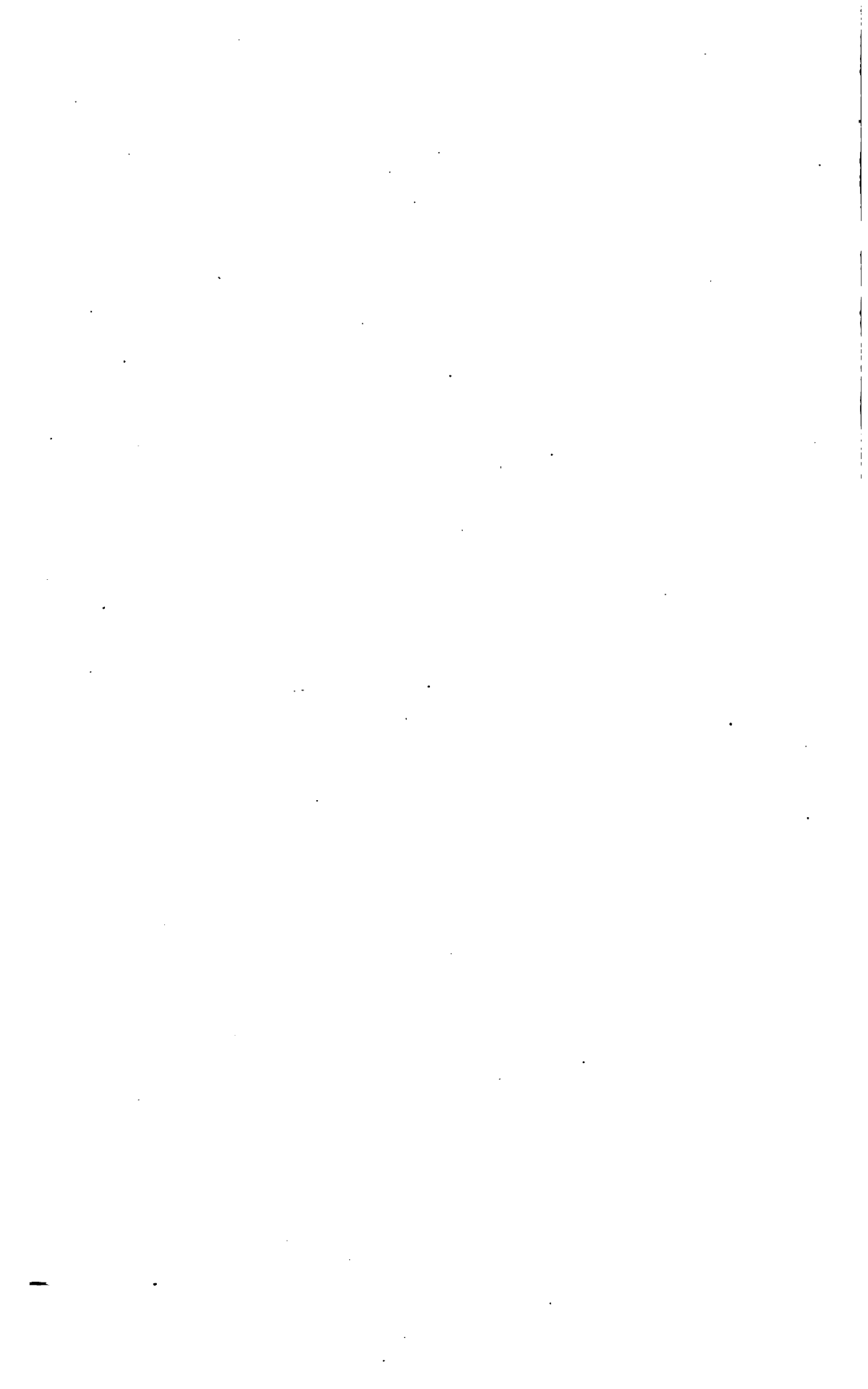
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1906

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# **A DIGEST OF INTERNATIONAL LAW**

**AS EMBODIED IN**

**DIPLOMATIC DISCUSSIONS, TREATIES AND  
OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL  
AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND  
THE WRITINGS OF JURISTS,**

**AND ESPECIALLY IN**

**DOCUMENTS, PUBLISHED AND UNPUBLISHED,  
ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF  
THE UNITED STATES,  
THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE  
DECISIONS OF COURTS, FEDERAL  
AND STATE.**

**BY**

**JOHN BASSETT MOORE, LL. D.,**

**Hamilton Fish Professor of International Law and Diplomacy, Columbia University,  
New York; Associate of the Institute of International Law; Sometime  
Third Assistant Secretary of State and Assistant Secretary of State of the United States;  
Author of a Treatise on Extradition and Interstate Rendition, of American Notes on  
the Conflict of Laws, of a History and Digest of International Arbitrations, of an Exposition of the Spirit and Achievements  
of American Diplomacy, etc.**

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I. *EARLY DECLARATIONS OF AMERICAN POLICY.*

## § 336.

"A cut or canal for purposes of navigation somewhere through the isthmus that connects the two Americas, to unite the Pacific and Atlantic Oceans, will form a proper subject of consideration at the congress. That vast object, if it should be ever accomplished, will be interesting, in a greater or less degree, to all parts of the world. But to this continent will probably accrue the largest amount of benefit from its execution; and to Colombia, Mexico, the Central Republic, Peru, and the United States, more than to any other of the American nations. What is to redound to the advantage of all America should be effected by common means and united exertions, and should not be left to the separate and unassisted efforts of any one power. . . . If the work should ever be executed so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls."

Mr. Clay, Sec. of State, to Messrs. Anderson and Sergeant, United States representatives to the Panama Congress, May 8, 1826, Proceedings of the Int. Am. Conference (1889-1890). IV. 113, 143.

See, as to the neutralization of territory, *supra*, § 178.

*“Resolved, That the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, such individuals or companies as may undertake to open a communication between the Atlantic and Pacific Oceans, by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever, by such stipulations, the free and equal right of navigating such canal to all such nations, on the payment of such reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work.”*

Senate resolution,  
1835.

Resolution of the Senate of the United States, adopted March 3, 1835. (Senate Journal, 23 Cong. 2 sess. 238.)

In order to comply with this resolution, President Jackson appointed Mr. Charles Biddle to make an investigation of transit routes. Mr. Biddle's instructions bear date May 1, 1835, and are signed by Mr. Forsyth, Secretary of State. They directed him to proceed to the San Juan River and ascend it to Lake Nicaragua, and then to go “by the contemplated route of communication by canal or railroad to the Pacific Ocean.” He was then to repair to Guatemala and procure copies of any laws passed to incorporate companies to carry the undertaking into effect, of any conventions entered into with foreign powers on the subject, and of any plans, surveys or estimates in relation to it. From Guatemala he was to proceed to Panama and make inquiries concerning the proposed railway across the isthmus and examine the route. He was then to repair to Bogota, and obtain any public documents relating to the proposed railway, and particularly a copy of the law of May 23, 1834, relating to it, a translation of which accompanied his instructions. (Mr. Forsyth, Sec. of State, to Mr. Biddle, special agent, May 1, 1835, MS. Inst. Special Missions, I. 126.) See, also, Mr. Forsyth, Sec. of State, to Mr. De Witt, chargé d'affaires at Guatemala, May 1, 1835, MS. Inst. Am. States, XV. 16.

“Your despatches nos. 9 & 10, reached me on the 25th ultimo, with reference to Lord Palmerston's note of the 19th of October last, requesting information relative to Colonel Biddle. I have to state that the only appointment ever held by him under this Government was an informal agency to make inquiries in Spanish America,—in pursuance of a resolution of the Senate dated 3d March, 1835,—into the existing state of the projects for uniting the Atlantic and Pacific Oceans through the Isthmus of Darien. Having executed this commission, Colonel Biddle returned to the United States in September last, and has since died at Philadelphia. If he has recently visited Europe, as is supposed by Lord Palmerston, for any purpose, either public or private, the fact is unknown to this Department. The above information, should it be deemed of sufficient interest, you are at liberty to communicate to Lord Palmerston. Probably the British minister wishes to have some information on the subject of the grant which, it is said, Colonel Biddle, associated with certain Colombian citizens, and British subjects, has obtained from the Colombian Government to open a communication across the Isthmus



of Darien by steamboats and railroad. In that grant this Government has no interest or concern. The privileges and conditions of it are indistinctly known to this department, but have been, without doubt, communicated to His Britannic Majesty's Government by their official representative or agent at Bogota." (Mr. Forsyth, Sec. of State, to Mr. Stevenson, min. to England, Jan. 5, 1837, MS. Inst. Great Britain, XIV. 232.)

Sept. 23, 1836. Mr. Forsyth instructed Mr. McAfee, chargé d'affaires of the United States at Bogota, "to disclaim all connection with the project" on the part of the United States. (Cong. Globe, 32 Cong. 3 sess., App., vol. 27, p. 251.)

"Territories or portions of territory belonging to a state other than those to which a permanent and conventional neutrality is assured, may, by an international act or in an international interest, be sheltered from acts of war. Such are said to be neutralized. This neutrality or neutralization bears only on the territory, on the soil, and exercises no direct influence on the generality of rights of the sovereign territorial state, nor on the population." (Rivier, *Principes du Droit des Gens*, I. 162.)

In 1839, the canal question was taken up in the House of Representatives, on a memorial of merchants of New York and Philadelphia, on which an elaborate report was made by Mr. Mercer, from the Committee on Roads and Canals. The report in conclusion proposed a resolution that the President should be requested "to consider the expediency of opening or continuing negotiations with the governments of other nations, and particularly with those the territorial jurisdiction of which comprehends the Isthmus of Panama, and to which the United States have accredited ministers or agents, for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific oceans, by the construction of a ship canal across the isthmus, and of securing forever, by suitable treaty stipulations, the free and equal right of navigating such canal to all nations."

This resolution was unanimously agreed to by the House.

Cong. Globe, 32 Cong. 3 sess., App., vol. 27, p. 251. See Message of President Van Buren, March 12, 1838, with report of Mr. Forsyth, Sec. of State, and accompanying correspondence, in relation to the expediency of opening negotiations with other nations with a view to the construction of a ship canal across the Isthmus of Darien. (H. Ex. Doc. 228, 25 Cong. 2 sess.)

"The progress of events has rendered the interoceanic routes across the narrow portions of Central America vastly important to the commercial world, and especially to the United States, whose possessions extending along the Atlantic and Pacific coasts demand the speediest and easiest modes of communication. While the just rights of sovereignty of the States occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion

Duty of local sov-  
ereign.

and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted, in a spirit of Eastern isolation, to close these gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them, and that they choose to shut them, or, what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use."

Mr. Cass, Sec. of State, to Mr. Lamar, min. to Cent. Am., July 25, 1858, Correspondence in relation to the Proposed Inter-oceanic Canal (Washington, 1885), 281.

## II. *ISTHMUS OF PANAMA.*

### 1. ARTICLE XXXV., TREATY OF 1846.

#### § 337.

"The United States of America and the Republic of New Granada, desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do agree to the following points:

"1st. For the better understanding of the preceding articles, it is and has been stipulated between the high contracting parties, that the citizens, vessels and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated Isthmus of Panama, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities concerning commerce and navigation, which are now or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States, in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than is, under like circumstances, levied upon and collected from the Granadian citizens; that any lawful produce, manufactures or merchandise belonging to citizens of the United States, thus passing from one sea

to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever; or, having paid such duties, they shall be entitled to drawback upon their exportation; nor shall the citizens of the United States be liable to any duties, tolls or charges of any kind, to which native citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

"2d. The present treaty shall remain in full force and vigor for the term of twenty years from the day of the exchange of the ratifications; and from the same day the treaty that was concluded between the United States and Colombia, on the thirteenth of October, 1824, shall cease to have effect, notwithstanding what was disposed in the first point of its 31st article.

"3d. Notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of, or all, the articles of this treaty twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform.

"4th. If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.

"5th. If unfortunately any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.

"6th. Any special or remarkable advantages that one or the other power may enjoy from the foregoing stipulation, are and ought to be always understood in virtue and as in compensation of the obligations

they have just contracted, and which have been specified in the first number of this article."

Art. 35, treaty between the United States and New Granada [now Republic of Colombia], Dec. 12, 1846. (Treaties and Conventions, 204-5.)

The treaty was approved by the United States Senate, June 3, 1848, by the following vote:

Yeas—Messrs. Atchison, Atherton, Badger, Bagby, Benton, Berrien, Borland, Bradbury, Bright, Butler, Calhoun, Davis of Mississippi, Dickinson, Dix, Downs, Foote, Hannegan, Houston, Hunter, Lewis, Moore, Niles, Rusk, Sebastian, Spruance, Turney, Underwood, Westcott, and Yulee—29.

Nays—Messrs. Baldwin, Clarke, Davis of Massachusetts, Dayton, Hale, Miller, and Upham—7. (Exec. Journal, VII. 424.)

"Colonel Sevier, the chairman of the Committee on Foreign Relations, informed me that a protracted debate would have arisen on the 35th article of the treaty, containing the guarantee on the part of the United States to New Granada of the neutrality of the Isthmus of Panama and her sovereignty over the same [if the consideration of the treaty had not been postponed till December 1847]; and for this reason the Senate, at so late a period of the session, were unwilling to enter upon its discussion. He entertains fair hopes, notwithstanding, that it will be ratified at the new session by a constitutional majority." (Mr. Buchanan, Sec. of State, to Mr. Bidlack, chargé d'affaires to Colombia, March 25, 1847, MS. Inst. Colombia, XV. 112.)

The Republic of New Granada subsequently became by constitutional changes the United States of Colombia and later the Republic of Colombia. These internal changes did not impair the continuing obligation of the treaty of 1846.

The ratifications of the treaty were exchanged June 10, 1848; and, as appears by the text of art. 35, it was to remain in force twenty years and thereafter, subject to its being "reformed" in the manner therein pointed out. Jan. 28, 1867, Gen. Salgar, the Colombian minister in Washington, stated in a note that he had been instructed to enter on a negotiation for the modification of the treaty. It does not appear, however, that the proposed discussion ever took place, and the two governments concurred in the view that the treaty remained in force. (Mr. Fish, Sec. of State, to Mr. Perez, Colombian min., Feb. 8, 1871; Mr. Perez to Mr. Fish, Feb. 13, 1871, and April 15, 1871; Mr. Fish to Mr. Perez, May 27, 1871: For. Rel. 1871, 243-248.)

See report of Mr. Buchanan, Sec. of State, May 7, 1846, with correspondence with United States ministers abroad on the subject of a ship canal across the Isthmus of Panama, and a paper by Mr. Henry Wheaton on water communication between Europe and the East Indies via Egypt and the Red Sea, and between the Atlantic and Pacific via Tehuantepec, Nicaragua, Darien, and Rio Atrato and Rio Choco. (S. Ex. Doc. 339, 29 Cong. 1 sess.)

(1) PRESIDENT POLK'S MESSAGE.

§ 338.

"I transmit to the Senate, for their advice with regard to its ratification, 'A general treaty of peace, amity, navigation and commerce between the United States of America and the Republic of New

Granada,' concluded at Bogota on the 12th December, last, by Benjamin A. Bidlack, chargé d'affaires of the United States, on their part, and by Manuel Maria Mallarino, secretary of state and foreign relations, on the part of that Republic.

"It will be perceived, by the 35th article of this treaty, that New Granada proposes to guarantee to the Government and citizens of the United States the right of passage across the Isthmus of Panama over the natural roads and over any canal or railroad which may be constructed to unite the two seas, on condition that the United States shall make a similar guarantee to New Granada of the neutrality of this portion of her territory and her sovereignty over the same.

"The reasons which caused the insertion of this important stipulation in the treaty will be fully made known to the Senate by the accompanying documents. From these it will appear that our chargé d'affaires acted, in this particular, upon his own responsibility and without instructions. Under such circumstances it became my duty to decide whether I would submit the treaty to the Senate; and after mature consideration, I have determined to adopt this course.

"The importance of this concession to the commercial and political interests of the United States cannot easily be overrated. The route by the Isthmus of Panama is the shortest between the two oceans, and from the information herewith communicated, it would seem to be the most practicable for a railroad or canal.

"The vast advantages to our commerce which would result from such a communication, not only with the west coast of America, but with Asia and the islands of the Pacific, are too obvious to require any detail. Such a passage would relieve us from a long and dangerous navigation of more than nine thousand miles around Cape Horn, and render our communication with our own possessions on the northwest coast of America comparatively easy and speedy.

"The communication across the Isthmus has attracted the attention of the Government of the United States ever since the independence of the South American Republics. On the 3d of March, 1835, a resolution passed the Senate in the following words: [Here follows the resolution, as given supra.]

"No person can be more deeply sensible than myself of the danger of entangling alliances with any foreign nation. That we should avoid such alliances, has become a maxim of our policy consecrated by the most venerated names which adorn our history and sanctioned by the unanimous voice of the American people. Our own experience has taught us the wisdom of this maxim in the only instance, that of the guarantee to France of her American possessions, in which we have ever entered into such an alliance. If, therefore, the very peculiar circumstances of the present case do not greatly impair if not altogether destroy the force of this objection, then we ought not to enter into the stipulation, whatever may be its advantages. The

general considerations which have induced me to transmit the treaty to the Senate for their advice may be summed up in the following particulars:

“1. The treaty does not propose to guarantee a territory to a foreign nation in which the United States will have no common interest with that nation. On the contrary, we are more deeply and directly interested in the subject of this guarantee than New Granada herself or any other country.

“2. The guarantee does not extend to the territories of New Granada generally, but is confined to the single province of the Isthmus of Panama, where we shall acquire by the treaty a common and co-extensive right of passage with herself.

“3. It will constitute no alliance for any political object, but for a purely commercial purpose, in which all the navigating nations of the world have a common interest.

“4. In entering into the mutual guarantees proposed by the 35th article of the treaty, neither the Government of New Granada nor that of the United States has any narrow or exclusive views. The ultimate object, as presented by the Senate of the United States in their resolution [of March 3, 1835] to which I have already referred, is to secure to all nations the free and equal right of passage over the Isthmus. If the United States, as the chief of the American nations, should first become a party to this guarantee, it can not be doubted, indeed it is confidently expected by the Government of New Granada, that similar guarantees will be given to that Republic by Great Britain and France. Should the proposition thus tendered be rejected, we may deprive the United States of the just influence which its acceptance might secure to them, and confer the glory and benefits of being the first among the nations in concluding such an arrangement upon the Government either of Great Britain or France. That either of these Governments would embrace the offer can not be doubted; because there does not appear to be any other effectual means of securing to all nations the advantages of this important passage but the guarantee of great commercial powers that the Isthmus shall be neutral territory. The interests of the world at stake are so important that the security of this passage between the two oceans can not be suffered to depend upon the wars and revolutions which may arise among different nations.

“Besides, such a guarantee is almost indispensable to the construction of a railroad or canal across the territory. Neither sovereign states nor individuals would expend their capital in the construction of these expensive works without some such security for their investments.

“The guarantee of the sovereignty of New Granada over the Isthmus is a natural consequence of the guarantee of its neutrality, and there does not seem to be any other practicable mode of securing the

neutrality of this territory. New Granada would not consent to yield up this province in order that it might become a neutral state, and if she should, it is not sufficiently populous or wealthy to establish and maintain an independent sovereignty. But a civil government must exist there in order to protect the works which shall be constructed. New Granada is a power which will not excite the jealousy of any nation. If Great Britain, France, or the United States held the sovereignty over the Isthmus other nations might apprehend that in case of war the Government would close up the passage against the enemy; but no such fears can ever be entertained in regard to New Granada.

"This treaty removes the heavy discriminating duties against us in the ports of New Granada which have nearly destroyed our commerce and navigation with that Republic, and which we have been in vain endeavoring to abolish for the last twenty years.

"It may be proper also to call the attention of the Senate to the 25th article of the treaty, which prohibits privateering in case of war between the two Republics; and also to the additional article which nationalizes all vessels of the parties which 'shall be provided by the respective Governments with a patent issued according to its laws,' and in this particular goes further than any of our former treaties."

President Polk, message to the Senate, Feb. 10, 1847, Executive Journal, VII. 191-193.

## (2) SUBSEQUENT ACTS AND INTERPRETATIONS.

### § 339.

Nov. 1, 1849, Mr. Thomas W. Ludlow, president of the Panama Railroad Company, requested that Mr. Lawrence, United States minister at London, might be instructed to cooperate with the minister of New Granada in that capital in obtaining from the British Government a guaranty of the neutrality of the Isthmus of Panama similar to that contained in Art. XXXV. of the treaty of 1846. Mr. Lawrence was instructed accordingly. It was in his instructions declared to be "of the utmost importance, especially in consideration of the opinions expressed by Lord Palmerston with reference to the Spanish American States who are delinquent debtors of British subjects, that the British Government should guarantee the neutrality of the Isthmus of Panama as amply as this has been done by the United States. For this purpose, it would be preferable that Great Britain and New Granada should themselves enter into treaty stipulations. . . . If, however, you shall ascertain that the British Government would not enter into such a treaty with New Granada, you may then sound Lord Palmerston as to the disposition of his Government to conclude one with the United States for the same purpose."

Isthmian "neutrality;" action of Mr. Clayton.

Mr. Clayton, Sec. of State, to Mr. Lawrence, min. to England, Dec. 18, 1849, MS. Inst. Gr. Br. XVI. 75.

See, also, Mr. Clayton, Sec. of State, to Mr. Foote, min. to Colombia, Dec. 15, 1849, instructing Mr. Foote to urge upon the New Granadian Government to take measures to negotiate with Great Britain. "The guaranty of Great Britain," said Mr. Clayton, "is necessary for the security of the capital to be invested in the railroad, and is of great and obvious importance to the United States." (MS. Inst. Colombia, XV. 183.)

With his instructions to Mr. Lawrence, of Dec. 18, 1849, *supra*, Mr. Clayton enclosed, with an expression of approval, a copy of a memorandum by Mr. James A. Hamilton, addressed to President Taylor, on the neutrality of the Isthmus of Panama. For the text of this memorandum, see *Reminiscences of James A. Hamilton*, 393.

Instructions similar to those sent to Mr. Lawrence were also sent by Mr. Clayton to Mr. Rives, minister to France, Jan. 26, 1850, with reference to possible negotiations with the French Government. (MS. Inst. France, XV. 125.)

See report of Mr. Butler King, Com. on Naval Affairs, Jan. 16, 1849, on the subject of a railroad across the Isthmus of Panama, H. Report 26, 30 Cong. 2 sess.; report of Mr. Rockwell, Select Committee, Feb. 20, 1849, on interoceanic communications, H. Report 145, 30 Cong. 2 sess.

See, also, Art. VIII. of the Clayton-Bulwer treaty, *infra*, §§ 351-355.

"I have to acknowledge the receipt of your letter of the 10th instant, stating that you are the holder of a grant from the Republic of New Granada, for the construction of an interoceanic canal across that Republic between the rivers Atrato and San Juan, and inquiring whether pursuant to the article of the treaty between the United States and Great Britain of the 19th of April, 1850, you can claim protection for the proposed work. In reply I have to inform you that the article referred to provides for future treaty stipulations between the parties with a view to the protection of a canal across the Isthmus of Panama which would, it is presumed, include the route for which you hold the grant referred to. There would be no objection on the part of this Government to enter into such stipulations, and none can be anticipated on the part of the British Government. As respects the Government of New Granada, it is believed that the stipulations in the 35th article of the treaty between the United States and that Republic, of the 12th December, 1846, would afford you ample protection."

Mr. Webster, Sec. of State, to Mr. Belknap, March 13, 1852, 40 MS. Dom. Let. 15.

"The proposition in your lordship's letter of the 24th ultimo for a joint convention between the United States, England, and France for the purpose of securing the freedom and neutrality of the transit route over the Isthmus of Panama has been submitted to the President, and I am now instructed to communicate to you his views concerning it.

Position of Mr.  
Cass.



“The President fully appreciates the importance of that route to the commercial nations of the world, and the great advantage which must result from its entire security both in peace and war, but he does not perceive that any new guarantee is necessary for this purpose on the part of the United States.

“By the treaty concluded with New Granada on the 12th of December, 1846, to which your lordship has referred, this Government guaranteed for twenty years the neutrality of the Isthmus, and also the rights of sovereignty and property over it of New Granada. A similar measure on the part of England and France would give additional security to the transit, and would be regarded favorably, therefore, by this Government. But any participation by the United States in such a measure is rendered unnecessary by the arrangement already referred to, and which still remains in full force. It would be inconsistent, moreover, with the established policy of this country to enter into a joint alliance with other powers, as proposed in your lordship’s note.

“The President is fully sensible, however, of the deep interest which must be felt by all commercial nations, not only in the Panama transit route, but in the opening of all the various passages across the Isthmus by which union of the two oceans may be practically effected. The progress already effected in these works has opened a new era in the intercourse of the world, and we are yet only at the commencement of their results.

“It is important that they should be kept free from the danger of interruption either by the Governments through whose territories they pass or by the hostile operations of other countries engaged in war.

“While the rights of sovereignty of the local governments must always be respected, other rights also have arisen in the progress of events involving interests of great magnitude to the commercial world, and demanding its careful attention, and, if need be, its efficient protection. In view of these interests, and after having invited capital and enterprise from other countries to aid in the opening of these great highways of nations under pledges of free transit to all desiring it, it cannot be permitted that these Governments should exercise over them an arbitrary and unlimited control, and close them or embarrass them without reference to the wants of commerce or the intercourse of the world. Equally disastrous would it be to leave them at the mercy of every nation, which, in time of war, might find it advantageous, for hostile purposes, to take possession of them and either restrain their use or suspend it altogether.

“The President hopes that by the general consent of the maritime powers all such difficulties may be prevented, and the interoceanic lines, with the harbors of immediate approach to them, may be

secured beyond interruption to the great purposes for which they were established."

Mr. Cass, Sec. of State, to Lord Napier, Brit. min., Sept. 10, 1857, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 153.

Lord Napier's note, to which the foregoing is a reply, is given at the same place.

June 26, 1862, General Herran, Colombian minister at Washington, invoked the interposition of the United States for the protection of the Isthmus of Panama against the revolutionary chief, Mosquera. Mr. Seward, in a note to Mr. Adams, then minister of the United States in London, July 11, 1862, said: "This Government has no interest in the matter different from that of other maritime powers. It is willing to interpose its aid in execution of its treaty and for the benefit of all nations." He therefore directed Mr. Adams, and also Mr. Dayton, minister to France, to confer with the governments to which they were respectively accredited, as to the action to be taken by the United States, either alone or jointly with those governments, "in guaranteeing the safety of the transit and the authority of the Granadian Confederation, or either of these objects."

Lord Russell, when Mr. Adams brought the subject to his notice, stated that, so far as his information went, no attempt had been made to obstruct the free transit of the Isthmus, but added that, on the happening of an actual derangement of communication, the British Government would readily cooperate with the United States in the measures that might be thought necessary to make good the privileges secured by the guarantee. Mr. Thouvenel replied, in behalf of the French Government, in a similar sense. He also intimated an opinion that Gen. Herran did not represent the Government actually in power in Colombia.

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, July 11, 1862, Cor. in relation to the Proposed Interoceanic Canal (Washington, 1885), 6.

The replies of Mr. Adams and Mr. Dayton, dated, respectively, Aug. 1 and Aug. 29, 1862, are given in the same document, pp. 7-8.

March 20, 1878, Mr. Lucien Napoleon Bonaparte Wyse obtained from the Government of Colombia a concession for the construction of an interoceanic canal across Colombian territory. The concession was approved by the Colombian Congress, May 18, 1878. It was obtained in the name of the International Interoceanic Canal Association, of Paris. The grantees undertook, however, to form, under the immediate protection of the Colombian Government, a joint-stock company, which should take the name of The Universal Interoceanic Canal Association, and it was agreed that the enterprise should "always be kept free from political influence."

The Wyse concession.

Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 86-93.

In April, 1879, Admiral Ammen, U. S. N., and Civil Engineer A. C. Menocal, U. S. N., were appointed commissioners of the United States to attend an international conference which was to assemble at Paris on the 15th of the following month, under the auspices of the Geographical Society of Paris, to consider various projects for a canal across the American Isthmus. They possessed, however, no official powers or diplomatic functions, and were not authorized to state what would be the decision of the United States on any of the points involved. The conference itself was understood to be one, not of diplomatic representatives of the respective governments, but of scientific men and public officers whose experience and research rendered it desirable that they should exchange views. (Mr. Evarts, Sec. of State, to Admiral Ammen, April 19, 1879, 127 MS. Dom. Let. 560.)

“By the treaty of 1846 the United States are guarantors of the neutrality of any interoceanic canal through the Isthmus of Panama, and of the sovereignty of the Republic of Colombia over the territory through which it passes.

Views of Mr.  
Evarts.

If we are rightly informed, no other Government has been willing to come into any such treaty relations with Colombia, and to-day such a canal by whomsoever completed would need to rest upon this stipulated protection of the United States, and should the United States recognize their rights under this concession, both its projectors and the Government of Colombia would be authorized under certain contingencies to call upon and be wholly dependent upon this Government for the fulfillment of this obligation. Under such circumstances the United States would have considered it as the manifestation of a just and friendly spirit if the Government of Colombia had furnished us timely information of the proposed concession, and thus enabled us to judge whether the conditions under which our guarantee had been made had been preserved with due consideration both of the rights which that guarantee confers and the obligations which it imposes. . . .

“But it cannot be overlooked that by the 35th article of the treaty of 1846 the United States has not only, ‘in order to secure to themselves the tranquil and constant enjoyment’ of the advantages of that treaty, undertaken to ‘guarantee positively and efficaciously to New Granada’ ‘the perfect neutrality of the before-mentioned Isthmus,’ but they have further obliged themselves to ‘also guarantee in the same manner the rights of sovereignty and property which New Granada has and possesses over the said territory.’ While, therefore, the United States have perfect confidence in these representations, as well as in the strong friendship of the French Government, it can scarcely be denied that such a concession to foreign subjects would introduce new questions of relative rights and interests affecting both the sovereign and proprietary rights of the Government of Colombia and such as would seriously enlarge the responsibilities of our treaty guarantee; and this Govern-

ment feels that it is not unreasonable in expecting that any concession involving such consequences should be a subject of joint consideration by, and that its details can scarcely be settled without a preliminary agreement between, the Governments of Colombia and the United States as to their effect upon existing treaty stipulations. . . . ”

The interest of the United States in the opening of a ship-canal on the Isthmus is peculiarly great. “Our Pacific coast is so situated that, with our railroad connections, time (in case of war) would always be allowed to prepare for its defense. But with a canal through the Isthmus the same advantage would be given to a hostile fleet which would be given to friendly commerce; its line of operations and the time in which warlike demonstration could be made, would be enormously shortened. All the treaties of neutrality in the world might fail to be a safeguard in a time of great conflict. . . .

“This Government cannot consider itself excluded, by any arrangements between other powers or individual to which it is not a party, from a direct interest, and if necessary a positive supervision and interposition in the execution of any project which, by completing an inter-oceanic connection through the Isthmus, would materially affect its commercial interests, change the territorial relations of its own sovereignty, and impose upon it the necessity of a foreign policy, which, whether in its feature of warlike preparation or entangling alliance, has been hitherto sedulously avoided.”

Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, April 19, 1880, MS. Inst. Colombia, XVII. 154, 157, 160, 163.

See the following documents:

Steps taken by the United States to promote the construction of an inter-oceanic canal, President's message, June 13, 1879, H. Ex. Doc. 10, 46 Cong. 1 sess.

Trade between Atlantic and Pacific coasts, report of Treasury Department, March 15, 1880, H. Ex. Doc. 61, 46 Cong. 2 sess.

Further letter from the Treasury on the same subject, May 15, 1880, H. Ex. Doc. 86, 46 Cong. 2 sess.

Testimony taken before select committee in regard to the selection of a suitable route, Feb. 25, 1881, H. Mis. Doc. 16, 46 Cong. 3 sess.

The Monroe Doctrine, report of Com. on Foreign Affairs, Feb. 14, 1881, H. Report 224, 46 Cong. 3 sess.; minority report, March 4, 1881, *id.*, part 2.

Report of the select committee on the interoceanic ship-canal, declaring that the United States will assert and maintain their right to possess and control any such canal, no matter what the nationality of its corporations or the source of their capital may be, Mar. 8, 1881, H. Report 390, 46 Cong. 3 sess.

Resolution declaring that the consent of the United States is a necessary condition precedent to the execution of any canal, Feb. 16, 1881, Senate Mis. Doc. 42, 46 Cong. 3 sess.

Resolution, April 27, 1881, S. Mis. Doc. 18, 47 Cong., special sess.

Mr. Burnside, Com. on For. Rel., May 16, 1881, reporting favorably a resolution declaring that the United States will insist that its consent is a necessary condition precedent to the execution of any way for the transit of ships, and to the adoption of rules and regulations under

which other nations may use it in time of peace or of war, S. Rep. 1, 47 Cong. special sess.

Senate resolution asking for information as to whether the Government had taken any action for the protection of United States interests in the projected canal, introduced Oct. 13, and passed Oct. 14, 1881, Cong. Record, 47 Cong. special sess. 522.

"It is, however, deemed prudent to instruct you, with all needful reserve and discretion, to intimate to the Colombian Government that any concession to Great Britain or any other foreign power, looking to the surveillance and possible strategic control of a highway of whose neutrality we are the guarantors, would be looked upon by the Government of the United States as introducing interests not compatible with the treaty relations which we maintain with Colombia."

Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, July 31, 1880, MS. Inst. Colombia, XVII. 181, in relation to a rumor that the British Government had been examining the Island of Gonzales, on the Pacific Coast of the Isthmus, with a view to establishing a naval station there.

"The relations between this government and that of the United States of Colombia have engaged public attention during the past year, mainly by reason of the project of an interoceanic canal across the Isthmus of Panama, to be built by private capital under a concession from the Colombian Government for that purpose. The treaty obligations subsisting between the United States and Colombia, by which we guarantee the neutrality of the transit and the sovereignty and property of Colombia in the isthmus, make it necessary that the conditions under which so stupendous a change in the region embraced in this guarantee should be effected—transforming, as it would, this isthmus, from a barrier between the Atlantic and Pacific oceans, into a gateway and thoroughfare between them for the navies and the merchant ships of the world—should receive the approval of this government, as being compatible with the discharge of these obligations on our part, and consistent with our interests as the principal commercial power of the Western Hemisphere. The views which I expressed in a special message to Congress in March last, in relation to this project, I deem it my duty again to press upon your attention. Subsequent consideration has but confirmed the opinion 'that it is the right and duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests.'"

President Hayes, annual message, Dec. 6, 1880. (For. Rel. xii.)

For the special message of March 8, 1880, above mentioned, and the report of Mr. Evarts, as Secretary of State, see S. Ex. Doc. 112, 46 Cong. 2 sess.

See, also, President Hayes' annual message, Dec. 1, 1879, as to a projected treaty between the United States and Colombia.

For the Wyse concession of March, 1878, for the construction of a canal across the Isthmus of Panama, see Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 86.

See Mr. Foster, Sec. of State, to Mr. Coughlin, Dec. 22, 1892, and to Mr. Abbott, Feb. 8, 1893, MS. Inst. Colombia, XVIII. 348, 359, concerning the extension or substitution of the Panama Canal concession.

“The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for, long in advance of any possible call for the actual exercise of power.

Circular of Mr.  
Blaine.

“In 1846 a memorable and important treaty was negotiated and signed between the United States of America and the Republic of New Granada, now the United States of Colombia. By the thirty-fifth article of that treaty, in exchange for certain concessions made to the United States we guaranteed ‘positively and efficaciously’ the perfect neutrality of the isthmus and of any interoceanic communications that might be constructed upon or over it for the maintenance of free transit from sea to sea; and we also guaranteed the rights of sovereignty and property of the United States of Colombia over the territory of the isthmus as included within the borders of the State of Panama.

“In the judgment of the President this guarantee, given by the United States of America, does not require re-inforcement, or accession, or assent from any other power. In more than one instance this government has been called upon to vindicate the neutrality thus guaranteed, and there is no contingency now foreseen or apprehended in which such vindication would not be within the power of this nation. . . .

“The great European powers have repeatedly united in agreements such as guarantees of neutrality touching the political condition of states like Luxembourg, Belgium, Switzerland, and parts of the Orient, where the localities were adjacent or where the interests involved concerned them nearly and deeply. Recognizing these facts the United States has never offered to take part in such agreements or to make any agreements supplementary to them.

While thus observing the strictest neutrality with respect to complications abroad, it is the long-settled conviction of this government that any extension to our shores of the political system by which the great powers have controlled and determined events in Europe would be attended with danger to the peace and welfare of this nation.”

Mr. Blaine, Sec. of State, to Mr. Lowell, June 24, 1881, For. Rel. 1881, 537.

Mr. Lowell was instructed to take an early opportunity to confer with Earl Granville and to read to him the foregoing instruction, and, if he should desire it, leave with him a copy of it. (Mr. Blaine, Sec. of

State, to Mr. Lowell, min. to England, June 25, 1881, MS. Inst. Great Britain, XXVI. 176.)

A similar instruction was sent to the minister of the United States at Paris. (Mr. Blaine, Sec. of State, to Mr. Noyes, min. to France, June 25, 1881, MS. Inst. France, XX. 808.)

In a communication to Mr. Hoppin, United States chargé, November 10, 1881, Lord Granville, replying to Mr. Blaine's representations, adverted to the fact that Mr. Blaine had disclaimed an intention on the part of the Government of the United States to initiate a discussion on the subject, and added: "I should wish, therefore, merely to point out to you that the position of Great Britain and the United States, with reference to the canal, irrespective of the magnitude of the commercial relations of the former power with countries to and from which, if completed, it will form a highway, is determined by the engagements entered into by them respectively in the convention which was signed at Washington, on the 19th of April, 1850, commonly known as the Clayton-Bulwer Treaty, and Her Majesty's Government rely with confidence upon the observance of all the engagements of that treaty." (For. Rel. 1881, 549.)

For a further discussion of the question of the Panama Canal and the Clayton-Bulwer treaty, see Mr. Blaine, Sec. of State, to Mr. Lowell, min. to England, Nov. 19, 1881, For. Rel. 1881, 554; same to same, Nov. 29, 1881, id. 563; Mr. Lowell to Mr. Blaine, Dec. 27, 1881, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 339; Lord Granville to Mr. West, British min. at Washington, Jan. 7 and 14, 1882, For. Rel. 1882, 302, 305; Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, May 8, 1882, For. Rel. 1882, 271; Lord Granville to Mr. West, Aug. 17, 1883, Correspondence in relation to the proposed Interoceanic Canal (Washington, 1885), 363; Mr. Frelinghuysen to Mr. Lowell, Nov. 22, 1883, Correspondence, etc. 365.

See, also, message of President Arthur, Dec. 19, 1883, communicating to the Senate a report of Mr. Frelinghuysen, Sec. of State, with some of the foregoing correspondence. S. Ex. Doc. 26, 48 Cong. 1 sess.

The volume entitled "Correspondence in relation to the Proposed Interoceanic Canal" (Washington, 1885) contains reprints of S. Ex. Doc. 112, 46 Cong. 2 sess.; S. Ex. Doc. 194, 47 Cong. 1 sess.; S. Ex. Doc. 26, 48 Cong. 1 sess.

"The questions growing out of the proposed interoceanic water-way across the Isthmus of Panama are of grave national importance. This government has not been unmindful of the solemn obligations imposed upon it by its compact of 1846 with Colombia, as the independent and sovereign mistress of the territory crossed by the canal, and has sought to render them effective by fresh engagements with the Colombian Republic looking to their practical execution. The negotiations to this end, after they had reached what appeared to be a mutually satisfactory solution here, were met in Colombia by a disavowal of the powers which its envoy had assumed, and by a proposal for renewed negotiation on a modified basis.

"Meanwhile this government learned that Colombia had proposed to the European powers to join in a guarantee of the neutrality of the proposed Panama Canal—a guarantee which would be in direct contravention of our obligation as the sole guarantor of the integrity of

Colombian territory and of the neutrality of the canal itself. My lamented predecessor felt it his duty to place before the European powers the reasons which make the prior guarantee of the United States indispensable, and for which the interjection of any foreign guarantee might be regarded as a superfluous and unfriendly act.

"Foreseeing the probable reliance of the British Government on the provisions of the Clayton-Bulwer treaty of 1850, as affording room for a share in the guarantees which the United States covenanted with Colombia four years before, I have not hesitated to supplement the action of my predecessor by proposing to Her Majesty's Government the modification of that instrument and the abrogation of such clauses thereof as do not comport with the obligations of the United States toward Colombia, or with the vital needs of the two friendly parties to the compact."

President Arthur, annual message, Dec. 6, 1881. (For. Rel. 1881, p. vi.)

In the summer of 1882, there was a rumor of a design on the part of Chile, with the support of England, Brazil and Ecuador, to occupy the Isthmus of Panama and control the canal route. (MS. Inst. Colombia, XVII. 294; MS. Inst. Cent. Am. XVIII. 253.)

### (3) NEGOTIATIONS OF 1856-7.

#### § 340.

In December 1856, Mr. Isaac E. Morse was sent as a special commissioner to New Granada in order to negotiate, jointly with Mr. Bowlin, then American minister at Bogotá, for the settlement of pending questions in relation to the Isthmian transit. The principal questions related to the demand of the United States for an indemnity for the destruction of American life and property in the Panama riot of April 15, 1856, and the attempt of the authorities in New Granada to impose high tonnage duties on American vessels and burdensome taxes on American mails. But the most urgent question at the moment was that of the preservation of order and security on the transit route. In order to accomplish the objects in view, Messrs. Morse and Bowlin were furnished with a project of a convention and instructed to urge its acceptance upon the Government of New Granada. By this convention it was proposed to make of Colon (Aspinwall) and Panama free ports, with semi-independent municipal governments, the headquarters of one to be at Panama and of the other at Colon. Each of these municipalities was to exercise jurisdiction over a district twenty miles in width, lying on either side of the Panama railroad and extending to the middle of the Isthmus. New Granada, while retaining sovereignty over this district, was not to exercise it in a manner inconsistent with the powers granted to the municipalities by the convention. Stipulations were also to be made for the protection of the railway. In case the transit route should be interrupted, or seriously threatened with interruption, by a force



likely to be too formidable for the local police, the naval and military forces of the United States were to be used for the purpose of keeping open and protecting the transit. New Granada was also to transfer to the United States all her interest in and control over the Panama railroad, whether by charter, contract or otherwise, and the United States was to be empowered to enforce all the obligations which the Panama Railroad Company had contracted with New Granada. If war should break out between the United States and New Granada, neither party was to occupy the municipal district above mentioned for belligerent purposes, or in any way to interrupt the transit. It was further to be provided that the transit should be open to the common use of all nations which should by treaty stipulations agree to treat the municipal district at all times as neutral and to respect the municipal authorities therein established, and foreign nations were to be invited to join in the mutual guarantee of the neutrality of the district and of the municipal governments and of the unobstructed use of the Panama railroad, or of any other road or route which might be established across the Isthmus within the limits of the designated territory. In order to insure to the Government and people of the United States the full enjoyment of the advantages of interoceanic communication and secure safe and commodious harbors for merchant vessels and national ships, it was proposed that New Granada should cede to the United States the island of Taboga and other islands in the harbor of Panama. The United States was to pay for the grants and cessions thus proposed not more than \$1,800,000, from which were to be deducted \$400,000 on account of claims of citizens of the United States against New Granada.

**Mr. Marcy, Sec. of State, to Messrs. Morse and Bowlin. Dec. 3, 1856, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 21-27.**

See, also, the text of this instruction in the manuscripts of the Department of State, where the amounts of money to be offered and accepted are given.

That the Government of New Granada declined "to even negotiate upon the questions at issue," see **Mr. Cass, Sec. of State, to Mr. Bowlin, April 17, 1857, MS. Inst. Colombia, XV. 264.**

#### (4) NEGOTIATIONS OF 1868-70.

##### § 341.

March 2, 1868, **Mr. Peter J. Sullivan**, minister resident of the United States at Bogotá, was instructed and furnished with a full power to negotiate a convention with Colombia for the purpose of facilitating the construction of an interoceanic canal through Colombian territory.

September 24, 1868, an act was passed by the legislature of the State of New York to incorporate a company for the construction of such a canal.

November 25, 1868, Mr. Caleb Cushing was sent to Bogota to aid Mr. Sullivan in his negotiations. On January 14, 1869, however, Mr. Sullivan succeeded in concluding a convention with the plenipotentiaries of Colombia. The question of the neutralization of the canal in time of war had formed an obstacle to the progress of the negotiations. As signed, Article IX. of the convention provided: "The United States of America shall have the right to use the canal for the passage of troops, munitions and vessels of war, in time of peace. The entrance to the canal shall be rigorously closed to the troops of nations which are at war with another or others, including their vessels and munitions of war."

In a note to the Colombian minister at Washington, January 18, 1869, written without knowledge that a convention had been signed, Mr. Seward expressed the "very deliberate conviction" (1) that "henceforth neither any foreign government nor the capitalists of any foreign nation, except the Government and capitalists of the United States, will ever undertake in good faith to build a canal across the Isthmus of Darien;" (2) that "the neutrality most desirable for Colombia is to be found in a combination of the power, authority and influence of the United States of America and the power, authority and influence of the United States of Colombia to protect the canal and make it productive of the largest commercial benefit to all nations;" and (3) that "not only would the United States be unwilling to enter into an entangling alliance with other foreign nations for the construction and maintenance of a passage through the Isthmus, but also that the idea that other commercial powers could and would consent to enter into a combination with the United States of America for that purpose is impracticable and visionary."

Under the convention, the United States was to construct the canal.

Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, March 2, 1868, MS. Inst. Colombia, XVI. 263; Mr. Seward, Sec. of State, to Peter Cooper, Esq., Sept. 28, Oct. 17 and 19, 1868, and Feb. 13, 1869, 79 MS. Dom. Let. 361. 550; Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, Oct. 24, 1868, MS. Inst. Colombia, XVI. 327; Mr. Seward, Sec. of State, to Mr. Cushing, Nov. 25, 1868, MS. Inst. Colombia, XVI. 332; Mr. Seward, Sec. of State, to Gen. Acosta, Colombian min., Jan. 18, 1869, MS. Notes to Colombia, VI. 240.

For the message of President Johnson, Feb. 15, 1869, transmitting to the Senate the convention signed Jan. 14, 1869, see Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 36.

With reference to various canal routes, see the "Problem of Interoceanic Communication by Way of the American Isthmus," by Lieut. John T. Sullivan, U. S. N.: Washington, 1883.

January 26, 1870, another convention between the United States and Colombia was signed at Bogotá, looking to the construction of the canal by the former Government. By Art. XI. of this treaty the United States was to guarantee that "the canal, its dependencies and appurtenances, shall be free and

exempt from all hostile acts on the part of any other nation or foreign power." The article further provided: "Both of the parties contracting in this treaty reserve to themselves the right of passing their ships of war, troops, and munitions of war through the canal at all times, free of all charge, impost, or duty; but the said canal shall be closed against the flag of all nations which may be at war with either of the contracting parties. No troops shall be allowed to pass through the canal with arms in their hands, except those of the United States of Colombia moving under constitutional authority, and those vessels of war of nations at peace with both contracting parties. With the exceptions herein named, the canal shall be open for the use of all nations and every kind of lawful business without distinction."

By Article XXV., however, the contracting parties mutually agreed "to use all possible efforts to obtain from other nations a guarantee in favor of the stipulations of immunity and neutrality mentioned in Article XI., and also in favor of the sovereignty of the United States of Colombia over the territory of the Isthmus of Panama and that of Darien." The United States also recognized and renewed the stipulations of Art. XXXV. of the treaty of 1846; and the article (XXV.) concludes: "Those nations which, by treaties entered into with the present contracting parties, shall unite in the guarantee of the neutrality of the canal and of sovereignty over the territory, as hereinbefore expressed and given by the United States of America, shall be relieved from tonnage and other imposts upon their ships of war either in full or to such extent as may be stipulated in such treaties."

The Colombian government opposed Art. XI. on the ground that it would practically make Colombia a party to any war in which the United States should become involved. The Colombian Senate modified the treaty so that the canal should remain free during the continuance of hostilities to the vessels of war, troops, and munitions of war of the belligerents; but no act of hostility was to be committed within the canal or its dependencies or within a certain distance of it, though it was to remain closed to the vessels of war which should not have joined in the guarantee.

For the full text of the convention, see the message of President Grant, transmitting it to the Senate, March 31, 1870, Conf. Exec. Q., 41 Cong. 2 sess.; reprinted in *Correspondence in relation to the Proposed Inter-oceanic Canal* (Washington, 1885), 40.

Certain correspondence, preceding and following the signature of the convention, was communicated by President Grant to the Senate, December 6, 1870, and was printed in Conf. Doc., Exec. E., 41 Cong. 3 sess.; reprinted in *Correspondence in relation to the Proposed Inter-oceanic Canal* (Washington, 1885), 48-86.

The Department of State, replying to a request of the Colombian minister for a statement of the objections entertained by the Senate of the United States to the convention, expressed its regret that it was not in its power to comply with the request. (Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Perez. June 9, 1871, MS. Notes to Colombia, VI. 277.)

A new treaty was proposed by the Colombian legation at Washington, but the negotiations did not result in an agreement. (Mr. Fish, Sec. of State, to Señor Martin, Colombian min., Dec. 6, 1872, and June 7 and Aug. 8, 1873, MS. Notes to Colombia, VI. 303, 311, 314.)

In answer to the statement that Colombia would expect a positive obligation to construct the canal, Mr. Fish replied that it was not likely that the United States would under any circumstances assume such an obligation, and that the question how far the United States might, pursuant to a convention with Colombia, extend its protection to a private enterprise of citizens of the United States for that purpose, must depend on the conclusion, which had not yet been reached, as to the practicability of the canal and the most eligible route for the work. (Mr. Fish, Sec. of State, to Señor Martin, Colombian min., Aug. 8, 1873, MS. Notes to Colombia, VI. 314.)

The Government of the United States subsequently reserved its decision as to whether it would send an engineer or any other person to join in a proposed survey of a part of the territory of Colombia by a "committee" of an "international association in Europe," till information should be received of the character of the proposed expedition, and whether any European government had appointed a member of the committee or had designated an engineer or other representative to make or unite in the survey. (Mr. Fish, Sec. of State, to Mr. Perez, Dec. 20, 1876, MS. Notes to Colombia, VI. 327.)

Mr. Fish had previously stated that the United States did not object to taking part in a conference of maritime powers at Constantinople for the purpose of dealing with questions "connected with the Suez Canal dues." It was stated that the minister of the United States at Constantinople had been instructed accordingly, but had not been authorized to commit his Government to any conclusion which might be reached, till there should have been an opportunity to examine the results of the conference. (Mr. Fish, Sec. of State, to Sir Edward Thornton, British min., Jan 14, 1873, MS. Notes to Great Britain, XVI. 15.)

#### (5) NEGOTIATIONS OF 1881.

#### § 342.

Feb. 17, 1881, Mr. W. H. Trescot, representing the United States, and Gen. Santo Domingo Vila, representing Colombia, signed at New York a protocol which purported to set forth the views of the two Governments with reference to the execution of Art. XXXV. of the treaty of 1846. It declared that any interoceanic communication through the Isthmus of Panama, by canal or otherwise, should be as free and open to the Government and citizens of the United States as to the Government and citizens of Colombia, "except in case, which God forbid, of war between the two nations." The two Governments were by common accord to select such points on the isthmus as they might deem proper for military and naval purposes and to provide by convention for the occupation and establishment of such places; and the United States, if occasion should arise for the performance of the guarantee of 1846, was authorized to occupy and hold the threatened territory during the exigency, in cooperation with the

Colombian forces. But, in time of peace, and when no exigency existed, only Colombian military forces were to be stationed in the Colombian territory. It was further agreed that, while the use of the canal in time of peace by the war vessels of other powers was not to be considered as a right, the two Governments would declare it open to the innocent use of such vessels, subject to such regulations and restrictions as they might jointly adopt.

Mr. Evarts declared, as Secretary of State, that the agreement on the points embraced in the protocol met his views and had received the approval of the President.

The Colombian Government, however, declined to approve the protocol, on the ground that it was at variance with the instructions of the Colombian negotiator, and with the means which Colombia deemed "best adapted to prevent any extension of the obligations contracted by both nations by the treaty of 1846" and to avoid the dangers which might arise from the construction of the canal.

For. Rel. 1881, 361-388, where correspondence and documents are given.

"The United States Government has not abandoned its right to insist that as guarantor of the neutrality of transit and sovereignty of Colombia over isthmian territory its consent was and will be necessary to the validity of any concession which might affect the conditions of the guarantee, but it has simply, presently accepted such a practical recognition of its rights as guarantor as will enable the Government to maintain its rights under the treaty of 1846 whenever the necessity for such maintenance shall arise, and you will govern any representations you may make accordingly. This will leave for further consideration the value and importance of requiring a firm stipulation that no new concession or modification of concession can be made without the concurrent approval of its terms by the United States as not objectionable treatment of the subject of our treaty engagements with Colombia—that is to say the Isthmus of Panama and interoceanic communication." (Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, Feb. 18, 1881, MS. Inst. Colombia, XVII. 229.)

See, also, Mr. Evarts to Mr. Dichman, Feb. 5, 1881, MS. Inst. Colombia, XVII. 208.

## 2. GUARANTEE OF NEUTRALITY AND SOVEREIGNTY.

### § 343.

"The obligations we have assumed [by the guarantee of the neutrality of the Isthmus] give us a right to offer, unasked, such advice to the New Granadian Government, in regard to its relations with other powers, as might tend to avert from that Republic a rupture with any nation which might covet the Isthmus of Panama."

Mr. Clayton, Sec. of State, to Mr. Foote, min. to New Granada, July 19, 1849, MS. Inst. Colombia, XV. 124.

“Your letter of the 8th instant has been duly received and submitted to the President, in which you inquire what interpretation is placed by the Government of the United States upon the thirty-fifth article of the treaty of the 12th of December, 1846, by which they guarantee positively and efficaciously to New Granada the perfect neutrality of the Isthmus of Panama.

Answer to Peruvian inquiry.

“The general scope and design of this stipulation are of course entirely apparent, and are set forth very distinctly in the article referred to; and your enquiry must therefore be understood to apply to the particular measures proposed to be adopted, on the occurrence of events menacing the neutrality of the Isthmus.

“The treaty being a compact between the United States and New Granada, to which no other government is a party, it might not be strictly proper nor in all respects convenient to enter into explanations with a third power, as to any measures which the United States might think it proper to adopt, if the neutrality of the Isthmus should be menaced. It may, however, be safely presumed that the magnitude of our interests in that quarter would dictate the pursuit of the policy best calculated to promote the desired end.

“But the latter portion of your note appears to contemplate the possibility that New Granada might avail herself of this guaranty of the neutrality of the Isthmus, to make it the seat of hostile preparations against Peru, and in that case the guaranty of neutrality would in effect become a defensive alliance between New Granada and the United States, by which Peru would suffer.

“Sincerely interested in the welfare of each of these powers, and sensible of the evils which would result to them and the inconvenience which would be occasioned to the commerce of the United States by a rupture between them, this government would view such an event with extreme regret, and would be prepared at any moment, and at the request of either party, to interpose their good offices to prevent it.

“I gather from your note of the 8th that the Peruvian government would deem it for their interest that the neutrality of the Isthmus should be respected by all other powers, as well as the United States. If the Peruvian Government thought proper to make a formal suggestion of this kind and a wish to become a party to the agreement, the government of the United States would receive such a suggestion with pleasure, and would communicate it to that of New Granada, with an intimation on our part that it would be agreeable to the United States that Peru should be associated by a proper public act, in the guaranty of the neutrality of the Isthmus.”

Mr. Everett, Sec. of State, to Mr. Osma, Peruvian min., Feb. 22, 1853, MS.  
Notes to Peruvian Leg. I. 79.

"I recommend to Congress the passage of an act authorizing the President, in case of necessity, to employ the land and naval forces of the United States to carry into effect this guaranty of neutrality and protection. I also recommend similar legislation for the security of any other route across the Isthmus in which we may acquire an interest by treaty."

President Buchanan, annual message, Dec. 8, 1857. (Richardson's Messages and Papers, V. 447.)

In 1864 the minister of foreign affairs of Colombia, in expectation of a war between Peru and Spain, in which the latter power might wish to send troops across the Isthmus of Panama, addressed a note to the minister of the United States at Bogotá, setting forth the expectation of the Colombian Government that the United States would carry into effect its guarantee of the neutrality of the Isthmus, as stipulated in Article XXXV. of the treaty of 1846. Mr. Seward submitted a copy of this note to the Attorney General of the United States, with a request for his opinion as to whether the article bound the United States forcibly, if need be, if required by Colombia, to interfere to prevent the transportation of troops and munitions of war across the Isthmus for the purpose of carrying on war against Peru. The Attorney General did not directly answer the question, but intimated that it related, at least potentially, to something substantially different in effect from the guarantee of the "perfect neutrality" of the Isthmus.

Mr. Seward, Sec. of State, to Mr. Bates, At.-Gen., Aug. 16, 1864, 65 MS. Dom. Let. 523; Bates, At.-Gen. (Aug. 18, 1864), 11 Op. 67; Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Aug. 20, 1864, MS. Inst. Colombia, XVI. 108.

The opinion of Attorney General Bates has been cited as holding that the guarantee of neutrality would oblige the Government of the United States to prevent such acts as those above mentioned, if it should be called upon by the proper party to do so. The opinion, however, does not directly meet the point, although the fact that it inveighs against the guarantee, as imposing on the United States an onerous burden, might seem to indicate an understanding on the part of the Attorney General that it applied to the case before him. But it is obvious that there is an essential difference, from the point of view of neutrality, between the passage of armed forces and the mere mercantile conveyance of munitions of war. On the whole, the opinion does not appear to afford any definite result.

The United States does not think itself bound to give explanations to the Government of Colombia as to the form of proceedings which it might suppose to be proper if occasion should arise for the landing of troops or naval forces in order to guarantee the sovereignty of

Colombia. The treaty and the law of nations must regulate the action of both governments should such an emergency unhappily arise.

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, April 30, 1866, MS. Inst. Colombia, XVI. 168, 189.

"A principal object of New Granada in entering into the treaty is understood to have been to maintain her sovereignty over the Isthmus of Panama against any attack from abroad. That object has been fully accomplished. No such attack has taken place, though this Department has reason to believe that one has upon several occasions been threatened, but has been averted by warning from this Government as to its obligation under the treaty. This Government has every disposition to carry the treaty into full effect."

Mr. Fish, Sec. of State, to Mr. Perez, Colombian min., May 27, 1871, For. Rel. 1871, 247, 248.

Our guarantee of neutrality to the Isthmus of Panama furnishes no ground for any action by this Government in restraint of the transportation of munitions of war to belligerents in a war as to which our Government is neutral.

Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treas., Nov. 14, 1879, 130 MS. Dom. Let. 472.

A copy of this letter was sent to Mr. Dichman, minister of United States at Bogota, with the statement that care should be taken "to avoid confusing in any way the neutrality of the Isthmus, as now under consideration, with the rules of neutrality which Colombia, as a sovereign state, may feel called upon to enforce in all her territory as towards other nations who may be at war. The construction of our guarantee, in case a conflict of interests or opinions should then arise, may properly be reserved for the situation as it may then be presented." It appears that the question was raised by representations made to the minister of the United States at Bogota by the Chilean chargé d'affaires at that capital, concerning the neutrality of the Isthmus of Panama during the war between Chile and Peru. (Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, Nov. 14, 1879, MS. Inst. Colombia, XVII. 121.)

By a decree of June 2, 1879, specially referring to the transportation of arms and munitions of war across the Isthmus, during the existence of the conflict between Peru, Bolivia, and Chile, the Government of Colombia laid down certain rules "as a guide to Colombia, as a neutral power." By these rules it was declared that the Panama railway should "serve universal commerce as a free way of transit without reference to the origin, species, or destination of goods." The transit of belligerent troops was, however, forbidden. (70 Br. & For. State Papers, 750.)



In 1880 the Colombian minister in the United States brought to the attention of the Department of State, with a view to explanations, certain newspaper reports as to the proceedings of the United States men-of-war *Adams* and *Kearsarge* in examining certain harbors in Colombia, apparently with a view to occupy them as naval stations. The Colombian minister was informed that the subject of the acquisition by the United States of "coaling stations" in the ports of the Isthmus "would be brought to the friendly attention of his Government" whenever the United States "considered such an acquisition useful to its commercial and naval interests." The minister of the United States at Bogotá was subsequently instructed to intimate to the Colombian Government the desire of the United States to acquire the right to establish coaling stations at certain points; and he was instructed to say that, as "this convenience had been accorded to the United States at various times in the Atlantic and Pacific waters by all friendly powers, upon the mere suggestion by this Government that it was desired," it was anticipated not only that no obstacle would be interposed, but that the acquiescence of the Colombian Government would be promptly and cordially afforded. "It is not deemed probable that any unwillingness to supply this accommodation will be manifested, but should there be any reluctance or hesitation you will remind the Government of Colombia that the treaty obligation of guarantee which the United States has assumed and the large and valuable traffic of the Panama railroad make the establishment at these points [Shepherd's Harbor on the Atlantic coast, and Golfito on the Pacific coast,] of naval and commercial facilities a matter of more than ordinary importance to both countries."

Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, April 19, 1880, MS. Inst. Colombia, XVII. 147, enclosing copies of correspondence with the Colombian minister concerning the proceedings of the *Adams* and the *Kearsarge*.

See, also, Mr. Evarts, Sec. of State, to Mr. Logan, June 25, 1880, MS. Inst. Central America, XVIII. 104, referring to the action of the authorities of the State of Panama, ostensibly under orders from Bogotá, in ordering the withdrawal of the *Adams* from Golfo Dulce, the territory and waters of which were part of the disputed boundary between Costa Rica and Colombia.

See, also, Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, July 31, 1880, MS. Inst. Colombia, XVII. 181.

For the correspondence between Mr. Evarts and the Colombian minister at Washington, and especially Mr. Evarts' notes of April 17 and June 5, 1880, in relation to coaling stations, see For. Rel. 1880, 335-341.

The Republics of Colombia and Costa Rica entered into a convention to refer certain differences as to their boundaries to the King of the Belgians, and, in case of his declination, successively to the King of Spain and the President of the Argentine Republic. When advised of the terms of this convention, which had been concluded without notice to the United States, Mr. Blaine, who was then Secretary of State, referring to the report that the King of the Belgians would decline, and that the matter would then be submitted to the King of Spain, declared that the United States, while it had no dissatisfaction to express at the election of his Catholic Majesty, was of opinion that any question affecting the territorial limits of the State of Panama was of direct practical concern to the United States; that under the guarantee of the treaty of 1846 the United States was entitled to an active interposition in the solution of any such question, should it deem its interests to require such intervention; and that the convention providing for the arbitration should have been the subject of frank communication to and friendly consultation with the United States on the part of the signatory powers. The United States would not, said Mr. Blaine, interfere to prevent the accomplishment of the arbitration, nor would it undertake to express any opinion as to the acceptance by the King of Spain of the invitation which was understood to have been tendered him. The United States, however, deemed it due to itself and respectful to his Catholic Majesty, to inform him in advance that the Government of the United States, where either its rights or interests were concerned, would not hold itself bound by any arbitration, where it had not been consulted on the subject or method and had had no voice in the selection of the arbitrator. This communication was to be made in case the invitation to his Catholic Majesty had actually been presented, but in making it anything in the nature of a protest was to be avoided, and it was to be declared that the communication was induced by the anxiety of the United States to avoid any misunderstanding or seeming disrespect to the decision which his Majesty might reach, should he accept the arbitration.

Mr. Blaine, Sec. of State, to Mr. Fairchild, min. to Spain, June 25, 1881, For. Rel. 1881, 1057.

See, also, Mr. Blaine, Sec. of State, to Mr. Putnam, min. to Belgium, May 31, 1881, For. Rel. 1881, 70, to the same effect. The Belgian foreign office stated that the King would not accept the trust. (For. Rel. 1881, 74, 75.)

A copy of the instruction to Mr. Fairchild was given to the Spanish foreign office, but the invitation to the King of Spain had not then been extended. (For. Rel. 1881, 1062, 1063, 1067.)

See, further, as to the boundary question, For. Rel. 1880, 310, 325; For. Rel. 1881, 99, 105, 111, 354.

"In the case of the proposed arbitration between Costa Rica and Colombia, the attitude of the United States was determined by two circumstances, the fact that certain American interests lay in the disputed strip of Isthmian territory, and the existence of our treaty guarantee of the sovereignty of Colombia over the State of Panama. In view of these circumstances, this Government felt bound to intimate its determination not to be bound by any arbitration concerning the territory of Panama, when the rights or interests of the United States are concerned, when we had not been consulted on the subject or method of arbitration or the selection of the arbitrator.

"In the present instance the subject-matter of arbitration does not appear to affect these two considerations. This Government is not aware that American citizens have any rights in the disputed territory, nor does it see that the settlement of the question will affect or impair our guarantee of Colombia's sovereignty over the Isthmus. Moreover, the considerations which have led to the selection of the King of Spain as arbitrator seem to have been so far founded in convenience as to entitle them to friendly recognition, particularly as the question to be determined is one of facts as to which the Colonial archives of the Kingdom will furnish conclusive evidence, and is not in any sense one of politics.

"On the other hand, this Government can not but feel that the decision of American questions pertains to America itself, and it would hesitate, even when consulted (*sic*) by the most friendly motives (such as naturally join it to that of Spain) to set on record an approval of a resort to European arbitration. As presented to Mr. Hamlin by the Colombian Minister, however, the inquiry seems to be not so much whether we will approve and support the proposed arbitration as whether we have any intention of signifying our opposition thereto.

"If the subject should again be brought to the attention of the Legation by the Minister of Colombia, you may say to him that this Government sees no reason to interfere to prevent the arbitration of the Colombian and Venezuelan boundary dispute by the King of Spain, and, in the absence of specific knowledge of the points to be submitted to arbitration, does not undertake to express an opinion thereon or as to whether our interests are or are not involved. We have every confidence in the impartiality of His Majesty in the premises, and as an abstract principle are glad to see any friendly and just settlement of disputes concerning interests so nearly allied to our own."

Mr. Frelinghuysen, Sec. of State, to Mr. Reed, chargé at Madrid, No. 123 (confid.), Jan. 4, 1883, MS. Inst. Spain, XIX. 254.

The question as to the interests of the United States, especially in consequence of the stipulations of Article XXXV. of the treaty of

1846, in the boundary arbitration between Colombia and Costa Rica, was adjusted in 1886. November 14, 1885, Mr. Bayard, who was then Secretary of State, addressed a note to the Colombian legation in Washington, in relation to the rights of guarantee or tenure which the Government of the United States or its citizens might be found to have with respect to the territory in dispute. By a supplementary convention between Colombia and Costa Rica, concluded January 20, 1886, it was expressly provided (Art. III.) that the judgment of arbitration should be confined to the territory within certain extreme limits, which were laid down in the supplementary convention, and it was also declared that the judgment could not in any way affect the rights which any third party, not having taken part in the arbitration, might allege to the "ownership" of the territory comprised within those limits. These stipulations were brought to the attention of the United States, with the assurance that they were intended to meet the points presented in Mr. Bayard's note of November 14, 1885. The United States accepted this formal assurance as sufficient, with the express understanding that the term "ownership (*propriedad*)" was employed in no restrictive sense, but included all "possessory or usufructuary rights and all easements and privileges which the United States or their citizens may possess in the disputed territory, not only as respects the relation of the United States to each or either of the contracting parties to the arbitration, but also with regard to the relation of the United States or their citizens toward any third government not actually a party to the submission." This declaration was deemed by the United States to be proper in view of the fact that the region in dispute, as defined in the supplementary convention, not only embraced territory to which the concessions of Colombia and Costa Rica and the mutual guarantees of the United States with Colombia might be found to be applicable, but also included territory coming within the scope of the existing arrangements of Nicaragua with the United States and the latter's citizens. In conclusion, Mr. Bayard said:

"So, accepting the declarations of the supplementary articles of 20th January, 1886, as fully responding to the views and propositions set forth in my note to Señor Gonzalez Viquez of the 14th November, 1885, I will have pleasure forthwith in carrying out the promise I then made, to announce to the Government of Spain, as the arbitrator accepted by Costa Rica and Colombia, that, in view of the formal understanding reached by the contracting parties to the arbitration, whereby the scope and effect thereof are defined without impairment of any rights of the third parties not sharing in the arbitration, the Government of the United States withdraws from the notification, made June 25, 1881, that it would not hold itself bound by the results of such arbitration.

"In so doing the Government of the United States feels that it is consistently lending its countenance to the general promotion of the

policy of arbitration which it has itself advocated and adopted on important occasions as a means of adjusting international differences or disputes, and aiding a resort whereby the peace and welfare of the South American States can be secured and the losses and demoralization attendant upon costly and useless warfare be prevented.

"I have addressed a communication in a similar sense to the envoy of the United States of Colombia at this capital."

Mr. Bayard, Sec. of State, to Señor Peralta, Costa Rican min., May 26, 1886, For. Rel. 1893, 280. See, also, Mr. Bayard, Sec. of State, to Mr. Curry, min. to Spain, May 26, 1886, MS. Inst. Spain, XX. 207; Mr. Porter, Act. Sec. of State, to Mr. Curry, No. 81, June 16, 1886, id. 233.

It seems that the immediate occasion of the signature of the supplementary convention of Jan. 20, 1886, was the death of H. C. M. Alfonso XII., who was king of Spain when the convention of arbitration was signed (Dec. 25, 1880). His death having raised a doubt as to the right of his successor to discharge the function of arbitrator under the convention, the supplementary convention declared that the government of Spain was "competent to continue in charge of the arbitration offered by the two republics and to pronounce . . . a final sentence." (For. Rel. 1893, 274-275.)

The supplementary convention was laid before the Spanish Government by a joint note of the Colombian and Costa Rican ministers at Madrid, May 19, 1887, with an expression of the hope that the Government of H. M. the Queen Regent would be "actuated by the same benevolent disposition by which His Majesty Alfonso XII. was actuated." (For. Rel. 1893, 275.)

As to further proceedings in the arbitration, see For. Rel. 1893, 213, 216, 266, 270, 281, 287; For. Rel. 1894, 180-193, 439.

"The United States are, by the treaty of 1846 with New Granada, now Colombia, guarantors of the rights of sovereignty and property which Colombia has and possesses over the territory of the Isthmus of Panama 'from its southernmost extremity until the boundary of Costa Rica,' and this Government is therefore interested in knowing the limits of the guarantee it has so assumed, and regards it as a solemn duty of friendship and good neighborhood to do what it can toward the determination of its own rights and duties in respect to a territory the bounds of which are unfixed and in controversy.

"Without, therefore, expressing any opinion touching the merits of the dispute now pending between Costa Rica and Colombia concerning the continuing validity of the boundary arbitration under the treaty of December 25, 1880, and without relinquishing the stand it has heretofore taken in regard to the rights of third parties in such arbitration, the Government of the United States, in a spirit of complete disinterestedness, feels constrained to represent to the two governments of Costa Rica and Colombia its earnest desire and hope that they shall waive the comparatively trivial obstacle to the accomplishment of the larger purpose of amicable arbitration which they have both advocated, and that they shall come to an understanding

whereby that high aim shall be realized, either by the continuance of the arbitration under Her Majesty the Queen Regent of Spain, or if Her Majesty be indisposed to resume her functions, then by the alternative method already agreed upon, or by resort to any impartial arbitrator."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Costa Rica, July 14, 1893, For. Rel. 1893, 202; see, also, 216. The same instruction was sent, *mutatis mutandis*, to the United States minister to Colombia.

See other correspondence with Colombia, For. Rel. 1893, 266; and with the legation of Costa Rica at Washington, id. 270-294.

The Government of the United States "is [not] a party to the arbitration negotiated between Costa Rica and Colombia. The correspondence you cite, and an examination of the Department's correspondence on the subject show, that upon the conclusion of the convention of December 25, 1880, the United States gave timely notice to the contracting governments and to the proposed arbitrators that this Government would not be bound by any results of an arbitration to which it was not a party, should the rights of the United States or of citizens of the United States in the disputed territory be affected thereby. Subsequently when, in 1886, the powers entered into a supplementary covenant to respect the rights of third parties whatever the result of the arbitration might be, they thereby merely recognized as valid the notification theretofore given by the United States, and met the expressed reservation not only as enunciated by the United States but in favor also of any third power, even had the latter made no reservation of ultimate rights. But this conventional agreement of the two powers no more operated to make the United States a party to the litigation than it could have operated to include therein any other third power whose right it professed to respect—such as Nicaragua, for example." (Mr. Gresham, Sec. of State, to Señor Peralta, Costa Rican min., May 18, 1893, For. Rel. 1893, 287, 288.)

In January 1885 it was reported that the relations between Italy

and Colombia had, in consequence of disputes as to  
Cerruti case.

the case of Cerruti, an Italian subject, who claimed that he had been injured by the Colombian Government, assumed a grave aspect; that Italy demanded an indemnity for Cerruti prior to any understanding; that the Italian minister at Bogotá had asked for his passports, and had announced the speedy arrival of Italian warships to enforce his government's demand. The minister of the United States at Paris was instructed to inquire whether France would join the United States and England in recommending that Italy and Colombia resort to the arbitration of Spain; and it was declared that the United States could not view with indifference a resort to armed force by a European power upon a government with which, as to a part of its territory, the United States had contracted such exceptional engagements as those with Colombia. A similar telegram was sent to the United States minister at Madrid.

In a confidential instruction to the minister of the United States at Bogotá, February 11, 1886, Mr. Bayard said: "As the earnest and

consistent advocates of international arbitration in settlement of differences and as friends of both parties to the present dispute, we are sincerely glad of a mode of settlement which will not excite the serious concern the United States could not but feel were a European power to resort to force against a sister republic of this hemisphere as to the sovereign and uninterrupted use of a part of whose territory we are guarantors, under the solemn faith of a treaty."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, tel., Jan. 29, 1886, MS. Inst. France, XXI. 278; Mr. Adee, Act. Sec. of State, to Mr. Curry, min. to Spain, Jan. 31, 1886, MS. Inst. Spain, XX. 162; Mr. Bayard, Sec. of State, to Mr. Jacob, min. to Colombia, confidential, Feb. 11, 1886, MS. Inst. Colombia, XVII. 498. See, also, Mr. Bayard, Sec. of State, to Mr. Becerra, Colombian min., Nov. 17, 1885, MS. Notes to Colombia, VII. 64.

The case of Cerruti was submitted to the mediation of the Government of Spain, and afterwards, in consequence of the failure to carry out the mediatorial recommendation, to the arbitration of the President of the United States. (Moore, Int. Arbitrations, II. 2117-2123; V. 4699.)

In 1890, when the dispute between Italy and Colombia had revived, by reason of difficulties relating to the execution of the mediatorial award of Spain, Mr. Blaine instructed the minister of the United States at Rome to intimate to the Italian Government the desire and willingness of the United States to aid in any proper way "toward a better understanding," but added: "Our position of perfect and impartial friendship toward both powers should not be weakened by any show of voluntary intervention, without a distinct intimation that an expression of the disinterested views of this Government on the matter now in dispute would be agreeable to both parties. . . . Your discreet and friendly offices thus freely held at the disposal of both parties, will, it is thought, more effectively aid a practical determination of the impending controversy than would the formal tender of our mediation; and at the same time make unnecessary any emphatic insistence on the deep concern with which this Government would view the expansion of this simple matter of detail into a serious question between a friendly European power and a neighboring American state, to which we are allied by strong ties of tradition and common interest." (Mr. Blaine, Sec. of State, to Mr. Porter, min. to Italy, March 1, 1890, MS. Inst. Italy, II. 450.)

### 3. GUARANTEE OF FREE AND OPEN TRANSIT.

#### (1) DOMESTIC DISTURBANCES.

#### § 344.

On the evening of April 15, 1856, a serious riot occurred at Panama. Early in the day the steamer *Illinois* arrived at Aspinwall (Colon) having on board 950 passengers, including many women and children, on their way to California. Most of the passengers had been transported on the Panama railway to Panama, in order to take the steamer for California, when an altercation occurred between a drunken passenger and a Panama negro, who

kept a provision stand near the railway station, over the refusal of the former to pay for a slice of watermelon which he had purchased and of which the price was a dime. A companion of the passenger paid the money, but the disturbance did not cease. During the quarrel a pistol shot was fired. The pistol belonged to the passenger, but there was some controversy as to who fired the shot. The evidence indicated that it was fired by a companion of the watermelon vendor, who took the pistol from the passenger (who had drawn it) and fired it at him. Immediately afterwards the negro and his companion ran away to the *Cienaga*, a marshy negro settlement near the railway station, and presently returned with a large crowd of negroes armed with stones, machetes, and other weapons, and commenced an attack on McFarland's Hotel (the Pacific House) and the Ocean House. Many of the passengers were in and about the railway station, and were orderly and not anticipating trouble. In a few minutes, however, the railway station was attacked, and the police joined the mob. The passengers defended themselves with such weapons as they had at hand. An appeal was made to the governor for protection, but it was alleged that he was remiss in his efforts to prevent what was done. Before the riot was stayed, about twenty persons were killed, only two of whom belonged to the assailants, and twenty-nine wounded, thirteen of whom were natives. The loss of the foreigners in property was large, the claims on that score amounting to half a million dollars. The United States demanded an indemnity from New Granada, and in so doing insisted upon the obligation of the latter, under the treaty of 1846, to secure to the Government and citizens of the United States a free and open transit. A long negotiation ensued resulting in the conclusion at Washington, September 10, 1857, of a convention which provided for the adjustment by means of a mixed commission of all claims of citizens of the United States upon the Government of New Granada which should have been presented prior to September 1, 1859, either to the Department of State at Washington or to the minister of the United States at Bogota, "and especially those for damages which were caused by the riot at Panama on the fifteenth of April, 1856, for which the said Government of New Granada acknowledges its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route."

For further particulars concerning the riot and the negotiations, as well as concerning the ultimate disposition of the claims. see Moore, *Int. Arbitrations*, II. 1261, et seq.

The claims convention was ratified by the Government of New Granada, July 8, 1858, with certain explanations and modifications. One of the explanations was as follows: "It is understood that the obligation of New Granada to maintain peace and good order on the interoceanic route of the Isthmus of Panama, of which Article I. of the convention speaks, is the same by which all nations are held to preserve peace and order within their territories, in conformity with general principles of



the law of nations and of the public treaties which they may have concluded." The umpire of the commission decided that the liability of New Granada was clearly and fully admitted by the convention and was not varied by this explanation. (Moore, *Int. Arbitrations*, II. 1369, 1379.)

In consequence of the failure of the Government of New Granada to make a suitable adjustment of the question of the riot claims when they were first presented, the American minister at Bogota was instructed to take his passports and return home, which he did. (Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268, 287.)

Certain claims of British subjects, growing out of the riot of April 15, 1856, were settled by direct agreement between Great Britain and Colombia, Dec. 7, 1868. (55 Br. & For. State Papers, 1219.)

"This state of insecurity is very prejudicial to both countries, and it is not doubted that when properly urged upon the consideration of New Granada that Government will take prompt and effectual measures to insure to the citizens of the United States the most ample protection for their persons and property on the isthmus within its territory. This is not only a duty of national obligation, but is expressly provided for in the treaty of 12th of December, 1846, between the United States and New Granada. The United States must have the free, safe, and uninterrupted transit for those citizens and for public and private property across the Isthmus of Panama to the full extent contemplated by that treaty, and this Government looks with confidence for the security of this right, and does not expect that any necessity will arise for the use of any other means for the secure enjoyment of it but an appeal to the State of New Granada to fulfil its treaty stipulations upon that subject. The United States may reasonably expect, after what has happened, that New Granada will station such a force along the route of the railroad and at Aspinwall and Panama as will secure adequate protection to the persons and property of the citizens of the United States."

Mr. Marcy, Sec. of State, to Mr. Bowlin, June 4, 1856, MS. Inst. Colombia, XV. 218.

The relations of the United States to the Isthmus require "that the passage across the Isthmus should be secure from danger of interruption. For this purpose, as well as for the ends of justice, exemplary punishment should be promptly inflicted upon the transgressors, and the responsibility of the Government of New Granada for the misconduct of its people should be recognized."

Mr. Marcy, Sec. of State, to Mr. Bowlin, May 3, 1856; June 4, 1856; Dec. 3, 1856. MS. Inst. Colombia, XV. 216, 218, 232.

"The present condition of the Isthmus of Panama, in so far as regards the security of persons and property passing over it, requires serious consideration. Recent incidents tend to show that the local authorities cannot be relied on to maintain the public peace of Panama,

and there is just ground for apprehension that a portion of the inhabitants are meditating further outrages, without adequate measures for the security and protection of persons or property having been taken, either by the State of Panama or by the General Government of New Granada.

"Under the guaranties of treaty, citizens of the United States have, by the outlay of several million dollars, constructed a railroad across the Isthmus, and it has become the main route between our Atlantic and Pacific possessions, over which multitudes of our citizens and a vast amount of property are constantly passing; to the security and protection of all which and the continuance of the public advantages involved it is impossible for the Government of the United States to be indifferent.

"I have deemed the danger of the recurrence of scenes of lawless violence in this quarter so imminent as to make it my duty to station a part of our naval force in the harbors of Panama and Aspinwall, in order to protect the persons and property of the citizens of the United States in those ports and to insure to them safe passage across the Isthmus. And it would, in my judgment, be unwise to withdraw the naval force now in those ports until, by the spontaneous action of the Republic of New Granada or otherwise, some adequate arrangement shall have been made for the protection and security of a line of inter-oceanic communication, so important at this time not to the United States only, but to all other maritime states, both of Europe and America."

President Pierce, annual message, Dec. 2, 1856. (Richardson's Messages and Papers, V. 416.)

For the contracts between the Panama Railroad Company and the Colombian Government of 1850, 1867, 1876, and 1880 see S. Doc. 264, 57 Cong., 1 sess., 203, 211; and particularly, as to the dispute concerning title to the island of Manzanillo, see *id.* 196, 255.

Subsequent discussions. "The question which has recently arisen under the 35th article of the treaty with New Granada, as to the obligation of this Government to comply with a requisition of the President of the United States of Colombia for a force to protect the Isthmus of Panama from invasion by a body of insurgents of that country, has been submitted to the consideration of the Attorney-General. His opinion is, that neither the text nor the spirit of the stipulation in that article by which the United States engages to preserve the neutrality of the Isthmus of Panama, imposes an obligation on this Government to comply with a requisition like that referred to. The purpose of the stipulation was to guarantee the Isthmus against seizure or invasion by a foreign power only. It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party. As it may be presumed, however, that our object in entering into such

a stipulation was to secure the freedom of transit across the Isthmus, if that freedom should be endangered or obstructed, the employment of force on our part to prevent this would be a question of grave expediency to be determined by circumstances. The Department is not aware that there is yet occasion for a decision upon this point."

Mr. Seward, Sec. of State, to Mr. Burton, Nov. 9, 1865. MS. Inst. Colombia, XVI. 144.

The foregoing instruction is based on the opinion of Speed, At. Gen., Nov. 7, 1865, 11 Op. 391.

See Mr. Seward, Sec. of State, to Mr. Pombo, Colombian chargé, May 30, 1861, MS. Notes to Colombia, VI. 110.

In 1866 a rumor became prevalent that an effort was about to be made to secure the independence of the State of Panama. A strong feeling in favor of such a measure was said to exist among the people of that State. With reference to this subject, the Department of State said: "The United States have always abstained from any connection with questions of internal revolution in the State of Panama or any other of the States of the United States of Colombia, and will continue to maintain a perfect neutrality to such domestic controversies. In the case, however, that the transit trade across the Isthmus should suffer from an invasion from either domestic or foreign disturbances of the peace in the State of Panama, the United States will hold themselves ready to protect the same."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Oct. 9, 1866, MS. Inst. Colombia, XVI. 202; confirmed in Mr. Seward to Mr. Burton, Nov. 9, 1866, id. 205.

Replying to certain confidential letters on the same subject, Mr. Seward said: "The matters contained in this correspondence have been submitted to the President in the Cabinet. The United States have taken, and will take no interest in any question of internal revolution in the State of Panama, or any other State of the United States of Colombia, but will maintain a perfect neutrality in regard to such domestic controversies. The United States will nevertheless hold themselves ready to protect the transit trade across the Isthmus against invasion by either the domestic or foreign disturbers of the peace in the State of Panama." (Mr. Seward, Sec. of State, to Mr. Aspinwall, Oct. 3, 1866, 74 MS. Dom. Let. 216.)

"This Department deems it important, in the interest of general commerce, and especially of the carrying trade of that route, that these disturbances should be guarded against. By the treaty with New Granada of 1846 this Government has engaged to guarantee the neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions; but it is regarded as the undoubted duty of the Colombian Government to protect it against attacks from local insurgents."

Mr. Fish, Sec. of State, to Mr. Scruggs, Oct. 29, 1873, MS. Inst. Colombia, XVI. 448.

"This Government, by the treaty with New Granada of 1846, has engaged a guarantee of neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions. Although such protection was of late efficiently given by the force under the command of Admiral Almy, it appears to have been granted with the consent and at the instance of the local authorities. It is, however, regarded as the undoubted duty of the Colombian Government to protect the road against attacks from local insurgents. The discharge of this duty will be insisted upon." (Mr. Fish, Sec. of State, to Mr. Keeler, Oct. 27, 1873, 100 MS. Dom. Let. 294.)

"I return, with thanks for the opportunity of reading it, the despatch No. 20 of the 29th ultimo addressed to the Navy Department by Captain Simpson of the *Omaha* from Panama. That officer appears to have been animated with a sense of the obligations of this Government to that of Colombia under the XXXVth Article of the Treaty of 1848. It is true that that article guarantees the neutrality of the Isthmus of Panama. It has, however, on several occasions been held by this Department that the stipulation does not apply in the event of an insurrection in that country, so far as to make it obligatory upon us to interfere. Still, as by the same article we are granted a free transit across the Isthmus, if the privileges should be trampled upon by an insurgent force, we may be considered as having a perfect right to keep the passage open. It is true that this is the duty of Colombia under the treaty, and the occasions are so frequent where it is necessary for us to perform the service at least by moral means, that the expediency of continuing the guarantee may at least admit of question." (Mr. Fish, Sec. of State, to Mr. Robeson, Sec. of Navy, Sept. 22, 1875, 110 MS. Dom. Let. 103.)

Art. 35 of the treaty between the United States and New Grenada of Dec. 12, 1846, "clearly looks to keeping the Isthmian transit open, even in time of war, as a public highway for our citizens and their wares, and therefore, in the opinion of this Department, furnishes no ground for any action by this Government in restraint or interruption of the transportation of the articles ['five packages containing a torpedo launch; in five sections, ready to be set up'] which Mr. Carter reported as being on the Isthmus in transit [from the United States] to Peru, or in respect of any other shipments of similar character."

Mr. Evarts, Sec. of State, to Mr. Sherman, Sec. of Treasury, Nov. 14, 1879, 130 MS. Dom. Let. 472.

**Insurrection of 1884-85, and after.** "Naval commanders on Isthmus already instructed to take proper precautions for protecting interests of our citizens."

Mr. Bayard, Sec. of State, to Boston Ice Co., tel., March 16, 1885, 154 MS. Dom. Let. 513.

See Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, March 17, 1885, 154 MS. Dom. Let. 504. "Your request that instructions be sent to the commanding officer of any United States naval vessel at Panama

to prevent any further interference with international communication was promptly communicated to my colleague, the Secretary of the Navy." (Mr. Bayard, Sec. of State, to Mr. Scrymser, Cent. & S. Am. Telegraph Co., March 28, 1885, 154 MS. Dom. Let. 608.)

During the existence of turbulent and lawless conditions on the Isthmus, it is desirable by the presence of United States men-of-war to prevent disturbance of the transit. (Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, April 18, 1885, 155 MS. Dom. Let. 138.)

"The duty of the United States on the Isthmus of Panama is measured by the terms and objects of its treaty with New Granada, and no employment of its forces either as a substitute for or support of local Government is authorized." (Mr. Bayard, Sec. of State, to Mr. Scrymser, April 16, 1885, 155 MS. Dom. Let. 117.)

See, also, Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, May 5, 1885, 155 MS. Dom. Let. 290.

April 14, 1885, the Colombian minister of foreign affairs informed the minister of the United States at Bogota that he had received an order from the President of the Republic to make known that the State of Panama was in a perilous situation, viewed with reference to the preservation of order, exterior as well as interior,—a situation which threatened the sovereignty of Colombia over the territory, since the Government found it impossible to send military forces thither with the necessary rapidity, and that the time had therefore arrived for soliciting the intervention of the United States in accordance with Article XXXV. of the treaty of 1846, "to the end that pending the arrival there of the national troops said Government will undertake to maintain harmless the rights and authority of the Colombian Government in the State of Panama."

Mr. Restrepo, Colombian min. of for. aff., to Mr. Scruggs, Amer. min., April 14, 1885, enclosed with Mr. Scruggs' No. 201, of April 16, 1885, For. Rel. 1885, 209-210.

"Emergencies growing out of civil war in the United States of Colombia demanded of the Government at the beginning of this administration the employment of armed forces to fulfill its guaranties under the thirty-fifth article of the treaty of 1846, in order to keep the transit open across the Isthmus of Panama. Desirous of exercising only the powers expressly reserved to us by the treaty, and mindful of the rights of Colombia, the forces sent to the Isthmus were instructed to confine their action to 'positively and efficaciously' preventing the transit and its accessories from being 'interrupted or embarrassed.'"

"The execution of this delicate and responsible task necessarily involved police control where the local authority was temporarily powerless, but always in aid of the sovereignty of Colombia. The prompt and successful fulfillment of its duty by this Government was highly appreciated by the Government of Colombia, and has been followed by expressions of its satisfaction. High praise is due to the officers and men engaged in this service. The restoration of peace on the

Mr. Fish, Sec. of State, to Mr. Scruggs, Oct. 29, 1873, MS. Inst. Colombia, XVI. 448.

"This Government, by the treaty with New Granada of 1846, has engaged a guarantee of neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions. Although such protection was of late efficiently given by the force under the command of Admiral Almy, it appears to have been granted with the consent and at the instance of the local authorities. It is, however, regarded as the undoubted duty of the Colombian Government to protect the road against attacks from local insurgents. The discharge of this duty will be insisted upon." (Mr. Fish, Sec. of State, to Mr. Keeler, Oct. 27, 1873, 100 MS. Dom. Let. 294.)

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Art. 35 of the treaty between the United States and New Grenada of Dec. 12, 1846, "clearly looks to keeping the Isthmian transit open, even in time of war, as a public highway for our citizens and their wares, and therefore, in the opinion of this Department, furnishes no ground for any action by this Government in restraint or interruption of the transportation of the articles ['five packages containing a torpedo launch; in five sections, ready to be set up'] which Mr. Carter reported as being on the Isthmus in transit [from the United States] to Peru, or in respect of any other shipments of similar character."

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Mr. Bayard, Sec. of State, to Boston Ice Co., tel., March 16, 1885, 154 MS. Dom. Let. 513.

See Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, March 17, 1885, 154 MS. Dom. Let. 504. "Your request that instructions be sent to the commanding officer of any United States naval vessel at Panama

to prevent any further interference with international communication was promptly communicated to my colleague, the Secretary of the Navy." (Mr. Bayard, Sec. of State, to Mr. Scrymser, Cent. & S. Am. Telegraph Co., March 28, 1885, 154 MS. Dom. Let. 608.)

During the existence of turbulent and lawless conditions on the Isthmus, it is desirable by the presence of United States men-of-war to prevent disturbance of the transit. (Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, April 18, 1885, 155 MS. Dom. Let. 138.)

"The duty of the United States on the Isthmus of Panama is measured by the terms and objects of its treaty with New Granada, and no employment of its forces either as a substitute for or support of local Government is authorized." (Mr. Bayard, Sec. of State, to Mr. Scrymser, April 16, 1885, 155 MS. Dom. Let. 117.)

See, also, Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, May 5, 1885, 155 MS. Dom. Let. 290.

April 14, 1885, the Colombian minister of foreign affairs informed the minister of the United States at Bogota that he had received an order from the President of the Republic to make known that the State of Panama was in a perilous situation, viewed with reference to the preservation of order, exterior as well as interior,—a situation which threatened the sovereignty of Colombia over the territory, since the Government found it impossible to send military forces thither with the necessary rapidity, and that the time had therefore arrived for soliciting the intervention of the United States in accordance with Article XXXV. of the treaty of 1846, "to the end that pending the arrival there of the national troops said Government will undertake to maintain harmless the rights and authority of the Colombian Government in the State of Panama."

Mr. Restrepo, Colombian min. of for. aff., to Mr. Scruggs, Amer. min., April 14, 1885, enclosed with Mr. Scruggs' No. 201, of April 16, 1885, For. Rel. 1885, 209-210.

"Emergencies growing out of civil war in the United States of Colombia demanded of the Government at the beginning of this administration the employment of armed forces to fulfill its guaranties under the thirty-fifth article of the treaty of 1846, in order to keep the transit open across the Isthmus of Panama. Desirous of exercising only the powers expressly reserved to us by the treaty, and mindful of the rights of Colombia, the forces sent to the Isthmus were instructed to confine their action to 'positively and efficaciously' preventing the transit and its accessories from being 'interrupted or embarrassed.'"

"The execution of this delicate and responsible task necessarily involved police control where the local authority was temporarily powerless, but always in aid of the sovereignty of Colombia. The prompt and successful fulfillment of its duty by this Government was highly appreciated by the Government of Colombia, and has been followed by expressions of its satisfaction. High praise is due to the officers and men engaged in this service. The restoration of peace on the

Isthmus by the re-establishment of the constituted government there being thus accomplished, the forces of the United States were withdrawn."

President Cleveland, annual message, Dec. 8, 1885. (For. Rel. 1885, p. iv.)  
See Mr. Bayard, Sec. of State, to Mr. Becerra, Colombian min., Oct. 7, 1885, MS. Notes to Colombia, VII. 52.

"While the good will of the Colombian government toward our country is manifest, the situation of American interests on the Isthmus of Panama has at times excited concern, and invited friendly action looking to the performance of the engagements of the two nations concerning the territory embraced in the interoceanic transit. With the subsidence of the Isthmian disturbances, and the erection of the State of Panama into a federal district under the direct government of the constitutional administration at Bogotá, a new order of things has been inaugurated which, although as yet somewhat experimental and affording scope for arbitrary exercise of power by the delegates of the national authority, promises much improvement." (President Cleveland, annual message, Dec. 6, 1886. (For. Rel. 1886, p. iv.)

"The Secretary of State, to whom has been referred the resolution of the House of Representatives of the 16th instant, requesting information as to what action has been taken 'by the Department of State to protect the interests of American citizens whose property was destroyed by fire caused by insurgents at Aspinwall, United States of Colombia, in 1885,' has the honor to say that negotiations were commenced in October last and are now pending between the United States and Colombia for the purpose of establishing an international commission to whom may be referred for adjustment, according to the rules of international law and the treaties existing between the two countries, the claims of citizens of the United States against the Government of Colombia growing out of the incident referred to in the resolution of the House of Representatives.

"It is understood to be the duty of the Government of Colombia, under the thirty-fifth article of the treaty between the United States and New Granada of the 12th of December, 1846, to keep the transit across the Isthmus of Panama upon any modes of communication that now exist, or that may hereafter be constructed, 'open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures, or merchandise, of lawful commerce, belonging to the citizens of the United States.' This duty was expressly acknowledged by the Government of New Granada in the claims convention with the United States of the 10th of September, 1857, in which it was agreed that there should be referred to a commission 'all claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of New Granada, which shall have been presented prior to the 1st day of September, 1859, either to the Department of State at Washington, or to the minister of the United States at Bogota, and



especially those for damages which were caused by the riot at Panama on the 15th of April, 1856, for which the said Government of New Granada acknowledges its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route.'

"This convention was afterwards extended by a convention between the United States and the United States of Colombia, concluded on February 10, 1864, in order that certain claims might be disposed of which the commission under the former convention had failed to decide during the time therein allowed them.

"On several occasions the Government of the United States, at the instance and always with the assent of Colombia, has, in times of civil tumult, sent its armed forces to the Isthmus of Panama to preserve American citizens and property along the transit from injuries which the Government of Colombia might at the time be unable to prevent. But, in taking such steps, this Government has always recognized the sovereignty and obligation of Colombia in the premises, and has never acknowledged, but, on the contrary, has expressly disclaimed, the duty of protecting the transit against domestic disturbance.

"The correspondence which this Department has had with the Government of Colombia respecting the pending convention it is not deemed compatible with the public interest to communicate to Congress in the present state of negotiations."

Mr. Bayard, Sec. of State, Report, Feb. 19, 1887, House Ex. Doc. 183, 49 Cong. 2 sess.; S. Doc. 264, 57 Cong. 1 sess. 119.

As to the claims referred to, see S. Doc. 264, 57 Cong. 1 sess.

The United States is not responsible for the losses of citizens of the United States resulting from the destruction of their property on the Isthmus of Panama by insurgents in times of civil disturbance in Colombia. (Mr. Bayard, Sec. of State, to Messrs. Howard's Sons, April 8, 1885, 155 MS. Dom. Let. 12; S. Doc. 264, 57 Cong. 1 sess. 9.)

It was stated that a claim of the Panama Railroad Company for payment by the United States of losses occasioned by the destruction of some of its property by the burning of Colon by insurgents in March 1885 would "receive due consideration" should the company "see fit ever seriously and actually to present it." (Mr. Bayard, Sec. of State, to Mr. Barlow, April 29, 1885, 155 MS. Dom. Let. 235; S. Doc. 264, 57 Cong. 1 sess. 15.)

In another letter to counsel for the Railroad Company, the Department said: "Obligation does not exist . . . upon the Government of the United States to maintain peace, order and security to the lives and property of such of its citizens as have seen fit to place themselves under the jurisdiction of the United States of Colombia, and to this end to maintain a naval force in those waters." (Mr. Bayard, Sec. of State, to Mr. Barlow, Nov. 6, 1886, 162 MS. Dom. Let. 99.)

The company afterwards filed with the Department of State a claim against Colombia, for the losses in question. The Colombian Government insisted on the filing of all such claims at Bogotá, to be dealt with by the Colombian tribunals. The Department of State notified the Colombian Government that the Government of the United States, in view of

the treaties between the two Governments, and of the informal agreement as to arbitration, could not assent to the Colombian decree, so as to compel citizens of the United States to resort for redress to the Colombian tribunals. "The fact of this notification has been made known to several claimants in response to their inquiries. But, while stating its position generally, as above disclosed, it is not competent for this Department to give advice in particular cases as to the course claimants should pursue." (Mr. Bayard, Sec. of State, to Messrs. Shipman, Barlow, Larocqué & Choate, Nov. 10, 1887, 166 MS. Dom. Let. 106; S. Doc. 264, 57 Cong. 1 sess. 164.)

See, also, Mr. Bayard, Sec. of State, to Messrs. Dodge & Sons, May 9, 1887, 164 MS. Dom. Let. 116; S. Doc. 264, 57 Cong. 1 sess. 128.)

For the decree of the Colombian Government, Aug. 19, 1885, in relation to claims growing out of the insurrection, see For. Rel. 1885, 281.

With reference to the claim of M. Pascal, a citizen of France, for losses by the burning of Colon, the Department of State remarked that "the responsibility, if any, rests with the Colombian Government," and that the presentation of the claim was a matter that concerned the French Government and not the Department. (Mr. Bayard, Sec. of State, to Mr. Jeffries, March 1, 1886, 159 MS. Dom. Let. 192; S. Doc. 264, 57 Cong. 1 sess. 79.)

See Mr. Adee, Act. Sec. of State, to Mr. Abbott, min. to Colombia, Oct. 24, 1890, For. Rel. 1890, 269; Mr. Adee, Second Assist. Sec. of State, to Mr. Bushe, Dec. 8, 1891, 184 MS. Dom. Let. 337; S. Doc. 264, 57 Cong. 1 sess., 269.

"If for any reason Colombia fails to keep transit open and free, as that Government is bound by treaty of 1846 to do, United States are authorized by same treaty to afford protection."

Mr. Gresham, Sec. of State, to Gen. Newton, tel., Feb. 1, 1895, 200 MS. Dom. Let. 449.

In March, 1895, Captain Cromwell, of the U. S. S. *Atlanta*, with the assent of the local authorities, landed a force at Bocas del Toro for the protection of American property.

November 24, 1901, Captain Perry, of the U. S. S. *Iowa*, in conformity with telegraphic instructions from Washington, landed forces at Panama, interference with the line of railway by the Liberals having taken place.

At a conference held on board the U. S. S. *Marietta* at Colon, November 28, 1901, the local commanders of the Government and Liberal forces being present, it was agreed that the city of Colon should on the following day be turned over to the charge of the naval officers of the United States, Great Britain, and France then present, by whom it should in turn be handed over to the Government commander, the object being to avoid the useless effusion of blood. About this time much fighting took place along the line of the railway, and for a few days armed guards from the United States

men-of-war were put on board the trains, the use of which was denied both to the Government and the Liberal forces.

On January 20, 1902, Captain Mead, of the U. S. S. *Philadelphia*, wrote to the Liberal general, Herrera, on board the *Almirante Padilla*, which was then entering the harbor of Panama, that no firing from his vessel must endanger in any way foreign shipping in the port, and that there must be no bombardment.

January 27, 1902, Captain Reisinger, of the U. S. S. *Philadelphia*, reported that the Government was then using the railroad freely and constantly for the transportation of troops and ammunition, and had adopted forcible measures for the purpose of preventing the Liberals from using it or from entering Colon and Panama, thus interrupting the transit and placing the passengers in danger. Against this action the consul-general of the United States at Panama protested. Captain Reisinger subsequently reported that, after February 4, the Government had sent a guard of about fifty men in a passenger coach next to the locomotive on each train leaving Colon or Panama, this coach being separated from the regular passenger coaches by baggage and express cars.

September 19, 1902, Commander McLean, of the U. S. S. *Cincinnati*, addressed an identical note to the commanders of the Government and revolutionary forces, in which he stated that the United States naval forces were guarding the railway trains and the line of transit across the Isthmus from sea to sea, and that no persons whatever would be allowed to obstruct, embarrass, or in any manner interfere with the trains or the transit route. He added that no armed men, except forces of the United States, would be allowed to come upon or use the line.

September 20, 1902, the civil war still continuing, Mr. Moody, Secretary of the Navy, cabled to Commander McLean, of the U. S. S. *Cincinnati*, that the United States guaranteed the perfect neutrality of the Isthmus, and that free transit from sea to sea should not be interrupted or embarrassed; that Colombia guaranteed that the right of way or transit across the Isthmus should be open and free to the Government and citizens of the United States and their property; that any transportation of troops which might contravene these stipulations should not be sanctioned, nor should any use of the road be permitted "which might convert the line of transit" into a "theater of hostility;" that the transportation of Government troops in such a manner as not to endanger the transit or provoke hostilities might not be objectionable, but that the Department must rely on his judgment to decide such questions, as the conditions might change from day to day.

It appears that the immediate occasion of Commander McLean's placing American guards on board the railway trains was that, after

the surrender of Agua Dulce, the Colombian Government withdrew the guards which it had itself been maintaining, and established guards outside the cities of Colon and of Panama, who stopped the trains before entering those places for the purpose of arresting any members of the Liberal party who might be found on board. Besides, in order to insure the stopping of trains, obstructions were placed upon the tracks. Under these circumstances Commander McLean landed detachments and put guards on each train. He gave permission, however, for the transportation of a number of Government troops, unarmed, their arms being carried in a baggage car on another train; but he advised the authorities that this should not be taken as a precedent, and that each case would be decided on its merits when presented.

October 2, 1902, Rear-Admiral Casey, who had arrived at Panama on the U. S. S. *Wisconsin*, observed, on a trip across the Isthmus, from ninety to a hundred Government soldiers, some of whom were ill, quartered in a car promiscuously with men, women, and children, so that the stench coming from the car was unbearable. For sanitary reasons, therefore, among others, he issued an order in which he stated that while the trains were running under the protection of the United States he must "decline the transportation of any combatant or any ammunition and arms over the road which might cause an interruption of traffic or convert the line of transit into a theater of hostility." The governor of Panama protested against any restriction of the Government's use of the road as an invasion of its sovereign and treaty rights; on the other hand, the commander of the revolutionary forces protested against the transportation of any Government troops or munitions of war, and virtually threatened the interruption of the transit if such transportation should be allowed. Now and then, however, the transportation of particular military officers of the Government was permitted, as well as the occasional dispatch of arms and ammunition; and at the end of October, 1902, the Government was permitted to transport troops on special separate trains, not under American guard, at hours other than those of the regular trains. At this time Government reinforcements had arrived on the Isthmus, so that it seemed probable that the Government would be able to maintain its supremacy along the line of the road and insure an uninterrupted transit. About the middle of November, 1902, it appearing that the Colombian Government was then able to maintain free transit and fulfill its treaty obligations on the Isthmus, Admiral Casey issued orders for the withdrawal of all American guards from the railway trains. Peace between the Government and the revolutionary forces was concluded on the 21st of November in the cabin of the admiral's flagship.

Nov. 2, 1903, Mr. Darling, Acting Secretary of the Navy, referring to an apprehended uprising on the Isthmus of Panama, cabled to the commander of the U. S. S. *Nashville*, at Colon, and of the *Dixie*, at Kingston, Jamaica, to "maintain free and uninterrupted transit," and, if an interruption was threatened by an armed force, to occupy the line of the railroad and prevent the "landing of any armed force with hostile intent, either Government or insurgent, either at Colon, Porto Bello, or other point"; also, to prevent the landing of a Government force which was reported to be approaching the Isthmus in vessels, if in their judgment such landing would precipitate a conflict. Similar instructions were cabled to the commander of the *Marblehead*, at Acapulco, and of the *Boston*, at San Juan del Sur, which were to proceed immediately to Panama, and prevent the "landing of any armed force, either Government or insurgent, with hostile intent at any point within 50 miles of Panama." Nov. 3 Mr. Darling telegraphed to the commander of the *Nashville*: "In the interest of peace make every effort to prevent Government troops at Colon from proceeding to Panama. The transit of the Isthmus must be kept open and order maintained." On Nov. 5 Mr. Moody, Secretary of the Navy, cabled to the *Boston* to prevent the recurrence of a reported bombardment of Panama by a Colombian gunboat, and to "prevent any armed force of either side from landing at Colon, Porto Bello, or vicinity."

For. Rel. 1903, 247, 248.

"By the act of June 28, 1902, the Congress authorized the President to enter into treaty with Colombia for the building of the canal across the Isthmus of Panama; it being provided that in the event of failure to secure such treaty after the lapse of a reasonable time, recourse should be had to building a canal through Nicaragua. It has not been necessary to consider this alternative, as I am enabled to lay before the Senate a treaty providing for the building of the canal across the Isthmus of Panama. This was the route which commended itself to the deliberate judgment of the Congress, and we can now acquire by treaty the right to construct the canal over this route. The question now, therefore, is not by which route the isthmian canal shall be built, for that question has been definitely and irrevocably decided. The question is simply whether or not we shall have an isthmian canal.

"When the Congress directed that we should take the Panama route under treaty with Colombia, the essence of the condition, of course, referred not to the Government which controlled that route, but to the route itself; to the territory across which the route lay,

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ident Roose-  
velt's Annual  
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not to the name which for the moment the territory bore on the map. The purpose of the law was to authorize the President to make a treaty with the power in actual control of the Isthmus of Panama. This purpose has been fulfilled.

"In the year 1846 this Government entered into a treaty with New Granada, the predecessor upon the Isthmus of the Republic of Colombia and of the present Republic of Panama, by which treaty it was provided that the Government and citizens of the United States should always have free and open right of way or transit across the Isthmus of Panama by any modes of communication that might be constructed, while in return our Government guaranteed the perfect neutrality of the above-mentioned Isthmus with the view that the free transit from the one to the other sea might not be interrupted or embarrassed. The treaty vested in the United States a substantial property right carved out of the rights of sovereignty and property which New Granada then had and possessed over the said territory. The name of New Granada has passed away and its territory has been divided. Its successor, the Government of Colombia, has ceased to own any property in the Isthmus. A new Republic, that of Panama, which was at one time a sovereign state, and at another time a mere department of the successive confederations known as New Granada and Colombia, has now succeeded to the rights which first one and then the other formerly exercised over the Isthmus. But as long as the Isthmus endures, the mere geographical fact of its existence, and the peculiar interest therein which is required by our position, perpetuate the solemn contract which binds the holders of the territory to respect our right to freedom of transit across it, and binds us in return to safeguard for the Isthmus and the world the exercise of that inestimable privilege. The true interpretation of the obligations upon which the United States entered in this treaty of 1846 has been given repeatedly in the utterances of Presidents and Secretaries of State. Secretary Cass in 1858 officially stated the position of this Government as follows:

"The progress of events has rendered the interoceanic route across the narrow portion of Central America vastly important to the commercial world, and especially to the United States, whose possessions extend along the Atlantic and Pacific coasts, and demand the speediest and easiest modes of communication. While the rights of sovereignty of the states occupying this region should always be respected, we shall expect that these rights be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted, in a spirit of Eastern isolation, to close the gates of intercourse on

the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them and that they choose to shut them, or, what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use.'

"Seven years later, in 1865, Mr. Seward in different communications took the following position:

" 'The United States have taken and will take no interest in any question of internal revolution in the State of Panama, or any State of the United States of Colombia, but will maintain a perfect neutrality in connection with such domestic altercations. The United States will, nevertheless, hold themselves ready to protect the transit trade across the Isthmus against invasion of either domestic or foreign disturbers of the peace of the State of Panama. . . . Neither the text nor the spirit of the stipulation in that article by which the United States engages to preserve the neutrality of the Isthmus of Panama, imposes an obligation on this Government to comply with the requisition [of the President of the United States of Colombia for a force to protect the Isthmus of Panama from a body of insurgents of that country]. The purpose of the stipulation was to guarantee the Isthmus against seizure or invasion by a foreign power only.'

"Attorney-General Speed, under date of November 7, 1865, advised Secretary Seward as follows:

" 'From this treaty it can not be supposed that New Granada invited the United States to become a party to the intestine troubles of that Government, nor did the United States become bound to take sides in the domestic broils of New Granada. The United States did guarantee New Granada in the sovereignty and property over the territory. This was as against other and foreign governments.'

"For four hundred years, ever since shortly after the discovery of this hemisphere, the canal across the Isthmus has been planned. For two score years it has been worked at. When made it is to last for the ages. It is to alter the geography of a continent and the trade routes of the world. We have shown by every treaty we have negotiated or attempted to negotiate with the peoples in control of the Isthmus and with foreign nations in reference thereto our consistent good faith in observing our obligations; on the one hand to the peoples of the Isthmus, and on the other hand to the civilized world whose commercial rights we are safeguarding and guaranteeing by our action. We have done our duty to others in letter and in spirit, and we have shown the utmost forbearance in exacting our own rights.

"Last spring, under the act above referred to, a treaty concluded between the representatives of the Republic of Colombia and of our

Government was ratified by the Senate. This treaty was entered into at the urgent solicitation of the people of Colombia and after a body of experts appointed by our Government especially to go into the matter of the routes across the Isthmus had pronounced unanimously in favor of the Panama route. In drawing up this treaty every concession was made to the people and to the Government of Colombia. We were more than just in dealing with them. Our generosity was such as to make it a serious question whether we had not gone too far in their interest at the expense of our own; for in our scrupulous desire to pay all possible heed, not merely to the real but even to the fancied rights of our weaker neighbor, who already owed so much to our protection and forbearance, we yielded in all possible ways to her desires in drawing up the treaty. Nevertheless the Government of Colombia not merely repudiated the treaty, but repudiated it in such manner as to make it evident by the time the Colombian Congress adjourned that not the scantiest hope remained of ever getting a satisfactory treaty from them. The Government of Colombia made the treaty, and yet when the Colombian Congress was called to ratify it the vote against ratification was unanimous. It does not appear that the Government made any real effort to secure ratification.

“Immediately after the adjournment of the Congress a revolution broke out in Panama. The people of Panama had long been discontented with the Republic of Colombia, and they had been kept quiet only by the prospect of the conclusion of the treaty, which was to them a matter of vital concern. When it became evident that the treaty was hopelessly lost, the people of Panama rose literally as one man. Not a shot was fired by a single man on the Isthmus in the interest of the Colombian Government. Not a life was lost in the accomplishment of the revolution. The Colombian troops stationed on the Isthmus, who had long been unpaid, made common cause with the people of Panama, and with astonishing unanimity the new Republic was started. The duty of the United States in the premises was clear. In strict accordance with the principles laid down by Secretaries Cass and Seward in the official documents above quoted, the United States gave notice that it would permit the landing of no expeditionary force, the arrival of which would mean chaos and destruction along the line of the railroad and of the proposed canal, and an interruption of transit as an inevitable consequence. The *de facto* Government of Panama was recognized in the following telegram to Mr. Ehrman:

““The people of Panama have, by apparently unanimous movement, dissolved their political connection with the Republic of Colombia and resumed their independence. When you are satisfied that



a de facto government, republican in form and without substantial opposition from its own people, has been established in the State of Panama, you will enter into relations with it as the responsible government of the territory and look to it for all due action to protect the persons and property of citizens of the United States and to keep open the isthmian transit, in accordance with the obligations of existing treaties governing the relations of the United States to that territory.'

"The Government of Colombia was notified of our action by the following telegram to Mr. Beaupré:

"The people of Panama having, by an apparently unanimous movement, dissolved their political connection with the Republic of Colombia and resumed their independence, and having adopted a government of their own, republican in form, with which the Government of the United States of America has entered into relations, the President of the United States, in accordance with the ties of friendship which have so long and so happily existed between the respective nations, most earnestly commends to the Governments of Colombia and of Panama the peaceful and equitable settlement of all questions at issue between them. He holds that he is bound not merely by treaty obligations, but by the interests of civilization, to see that the peaceful traffic of the world across the Isthmus of Panama shall not longer be disturbed by a constant succession of unnecessary and wasteful civil wars.'

"When these events happened, fifty-seven years had elapsed since the United States had entered into its treaty with New Granada. During that time the Governments of New Granada and of its successor, Colombia, have been in a constant state of flux. The following is a partial list of the disturbances on the Isthmus of Panama during the period in question as reported to us by our consuls. It is not possible to give a complete list, and some of the reports that speak of 'revolutions' must mean unsuccessful revolutions.

"May 22, 1850.—Outbreak: two Americans killed. War vessel demanded to quell outbreak.

"October, 1850.—Revolutionary plot to bring about independence of the Isthmus.

"July 22, 1851.—Revolution in four southern provinces.

"November 14, 1851.—Outbreak at Chagres. Man-of-war requested for Chagres.

"June 27, 1853.—Insurrection at Bogotá, and consequent disturbance on Isthmus. War vessel demanded.

"May 23, 1854.—Political disturbances; war vessel requested.

"June 28, 1854.—Attempted revolution.

"October 24, 1854.—Independence of Isthmus demanded by provincial legislature.

"April, 1856.—Riot, and massacre of Americans.

"May 4, 1856.—Riot.

"May 18, 1856.—Riot.

"June 3, 1856.—Riot.

"October 2, 1856.—Conflict between two native parties. United States forces landed.

- "December 18, 1858.—Attempted secession of Panama.
- "April, 1859.—Riots.
- "September, 1860.—Outbreak.
- "October 4, 1860.—Landing of United States forces in consequence.
- "May 23, 1861.—Intervention of the United States forces required by intendente.
- "October 2, 1861.—Insurrection and civil war.
- "April 4, 1862.—Measures to prevent rebels crossing Isthmus.
- "June 13, 1862.—Mosquera's troops refused admittance to Panama.
- "March, 1865.—Revolution, and United States troops landed.
- "August, 1865.—Riots; unsuccessful attempt to invade Panama.
- "March, 1866.—Unsuccessful revolution.
- "April, 1867.—Attempt to overthrow Government.
- "August, 1867.—Attempt at revolution.
- "July 5, 1868.—Revolution; provisional government inaugurated.
- "August 29, 1868.—Revolution; provisional government overthrown.
- "April, 1871.—Revolution; followed apparently by counter revolution.
- "April, 1873.—Revolution and civil war which lasted to October, 1875.
- "August, 1876.—Civil war which lasted until April, 1877.
- "July, 1878.—Rebellion.
- "December, 1878.—Revolt.
- "April, 1879.—Revolution.
- "June, 1879.—Revolution.
- "March, 1883.—Riot.
- "May, 1883.—Riot.
- "June, 1884.—Revolutionary attempt.
- "December, 1884.—Revolutionary attempt.
- "January, 1885.—Revolutionary disturbances.
- "March, 1885.—Revolution.
- "April, 1887.—Disturbance on Panama Railroad.
- "November, 1887.—Disturbance on line of canal.
- "January, 1889.—Riot.
- "January, 1895.—Revolution which lasted until April.
- "March, 1895.—Incendiary attempt.
- "October, 1899.—Revolution.
- "February, 1900, to July, 1900.—Revolution.
- "January, 1901.—Revolution.
- "July, 1901.—Revolutionary disturbances.
- "September, 1901.—City of Colon taken by rebels.
- "March, 1902.—Revolutionary disturbances.
- "July, 1902.—Revolution.

"The above is only a partial list of the revolutions, rebellions, insurrections, riots, and other outbreaks that have occurred during the period in question; yet they number 53 for the 57 years. It will be noted that one of them lasted for nearly three years before it was quelled; another for nearly a year. In short, the experience of over half a century has shown Colombia to be utterly incapable of keeping order on the Isthmus. Only the active interference of the United States has enabled her to preserve so much as a semblance of sovereignty. Had it not been for the exercise by the United States of the police power in her interest, her connection with the Isthmus would have been sundered long ago. In 1856, in 1860, in 1873, in

1885, in 1901, and again in 1902, sailors and marines from United States warships were forced to land in order to patrol the Isthmus, to protect life and property, and to see that the transit across the Isthmus was kept open. In 1861, in 1862, in 1885, and in 1900, the Colombian Government asked that the United States Government would land troops to protect its interests and maintain order on the Isthmus. Perhaps the most extraordinary request is that which has just been received and which runs as follows:

“ ‘Knowing that revolution has already commenced in Panama [an eminent Colombian] says that if the Government of the United States will land troops to preserve Colombian sovereignty, and the transit, if requested by Colombian chargé d'affaires, this Government will declare martial law; and, by virtue of vested constitutional authority, when public order is disturbed, will approve by decree the ratification of the canal treaty as signed; or, if the Government of the United States prefers, will call extra session of the Congress—with new and friendly members—next May to approve the treaty. [An eminent Colombian] has the perfect confidence of vice-president, he says, and if it became necessary will go to the Isthmus or send representative there to adjust matters along above lines to the satisfaction of the people there.’ ”

“This dispatch is noteworthy from two standpoints. Its offer of immediately guaranteeing the treaty to us is in sharp contrast with the positive and contemptuous refusal of the Congress which has just closed its sessions to consider favorably such a treaty; it shows that the Government which made the treaty really had absolute control over the situation, but did not choose to exercise this control. The dispatch further calls on us to restore order and secure Colombian supremacy in the Isthmus, from which the Colombian Government has just by its action decided to bar us by preventing the construction of the canal.

“The control, in the interest of the commerce and traffic of the whole civilized world, of the means of undisturbed transit across the Isthmus of Panama has become of transcendent importance to the United States. We have repeatedly exercised this control by intervening in the course of domestic dissension, and by protecting the territory from foreign invasion. In 1853 Mr. Everett assured the Peruvian minister that we should not hesitate to maintain the neutrality of the Isthmus in the case of war between Peru and Colombia. In 1864 Colombia, which has always been vigilant to avail itself of its privileges conferred by the treaty, expressed its expectation that in the event of war between Peru and Spain the United States would carry into effect the guaranty of neutrality. There have been few administrations of the State Department in which this treaty has not, either by the one side or the other, been used as a

basis of more or less important demands. It was said by Mr. Fish in 1871 that the Department of State had reason to believe that an attack upon Colombian sovereignty on the Isthmus had, on several occasions, been averted by warning from this Government. In 1886, when Colombia was under the menace of hostilities from Italy in the Cerruti case, Mr. Bayard expressed the serious concern that the United States could not but feel, that a European power should resort to force against a sister republic of this hemisphere, as to the sovereign and uninterrupted use of a part of whose territory we are guarantors under the solemn faith of a treaty.

"The above recital of facts establishes beyond question: First, that the United States has for over half a century patiently and in good faith carried out its obligations under the treaty of 1846; second, that when for the first time it became possible for Colombia to do anything in requital of the services thus repeatedly rendered to it for fifty-seven years by the United States, the Colombian Government peremptorily and offensively refused thus to do its part, even though to do so would have been to its advantage and immeasurably to the advantage of the State of Panama, at that time under its jurisdiction; third, that throughout this period revolutions, riots, and factional disturbances of every kind have occurred one after the other in almost uninterrupted succession, some of them lasting for months and even for years, while the central government was unable to put them down or to make peace with the rebels; fourth, that these disturbances instead of showing any sign of abating have tended to grow more numerous and more serious in the immediate past; fifth, that the control of Colombia over the Isthmus of Panama could not be maintained without the armed intervention and assistance of the United States. In other words, the Government of Colombia, though wholly unable to maintain order on the Isthmus, has nevertheless declined to ratify a treaty the conclusion of which opened the only chance to secure its own stability and to guarantee permanent peace on, and the construction of a canal across, the Isthmus.

"Under such circumstances the Government of the United States would have been guilty of folly and weakness, amounting in their sum to a crime against the Nation, had it acted otherwise than it did when the revolution of November 3 last took place in Panama. This great enterprise of building the interoceanic canal can not be held up to gratify the whims, or out of respect to the governmental impotence, or to the even more sinister and evil political peculiarities, of people who, though they dwell afar off, yet, against the wish of the actual dwellers on the Isthmus, assert an unreal supremacy over the territory. The possession of a territory fraught with such peculiar capacities as the Isthmus in question carries with it obligations to mankind. The course of events has shown that this

canal can not be built by private enterprise, or by any other nation than our own; therefore it must be built by the United States.

"Every effort has been made by the Government of the United States to persuade Colombia to follow a course which was essentially not only to our interests and to the interests of the world, but to the interests of Colombia itself. These efforts have failed; and Colombia, by her persistence in repulsing the advances that have been made, has forced us, for the sake of our own honor, and of the interest and well-being, not merely of our own people, but of the people of the Isthmus of Panama and the people of the civilized countries of the world, to take decisive steps to bring to an end a condition of affairs which had become intolerable. The new Republic of Panama immediately offered to negotiate a treaty with us. This treaty I herewith submit. By it our interests are better safeguarded than in the treaty with Colombia which was ratified by the Senate at its last session. It is better in its terms than the treaties offered to us by the Republics of Nicaragua and Costa Rica. At last the right to begin this great undertaking is made available. Panama has done her part. All that remains is for the American Congress to do its part and forthwith this Republic will enter upon the execution of a project colossal in its size and of well-nigh incalculable possibilities for the good of this country and the nations of mankind.

"By the provisions of the treaty the United States guarantees and will maintain the independence of the Republic of Panama. There is granted to the United States in perpetuity the use, occupation, and control of a strip ten miles wide and extending three nautical miles into the sea at either terminal, with all lands lying outside of the zone necessary for the construction of the canal or for its auxiliary works, and with the islands in the Bay of Panama. The cities of Panama and Colon are not embraced in the canal zone, but the United States assumes their sanitation and, in case of need, the maintenance of order therein. The United States enjoys within the granted limits all the rights, power, and authority which it would possess were it the sovereign of the territory to the exclusion of the exercise of sovereign rights by the Republic. All railway and canal property rights belonging to Panama and needed for the canal pass to the United States, including any property of the respective companies in the cities of Panama and Colon; the works, property, and personnel of the canal and railways are exempted from taxation as well in the cities of Panama and Colon as in the canal zone and its dependencies. Free immigration of the personnel and importation of supplies for the construction and operation of the canal are granted. Provision is made for the use of military force and the building of fortifications by the United States for the pro-

tection of the transit. In other details, particularly as to the acquisition of the interests of the New Panama Canal Company and the Panama Railway by the United States and the condemnation of private property for the uses of the canal, the stipulations of the Hay-Herran treaty are closely followed, while the compensation to be given for these enlarged grants remains the same, being ten millions of dollars payable on exchange of ratifications; and, beginning nine years from that date, an annual payment of \$250,000 during the life of the convention."

President Roosevelt, annual message, Dec. 7, 1903. (For. Rel. 1903, p. xxxii.)

"The President yesterday fully recognized the Republic of Panama and formally received its minister plenipotentiary. You will promptly communicate this to the Government to which you are accredited."

Mr. Hay, Sec. of State, to all U. S. dip. representatives, circular telegram, Nov. 14, 1903. (MS. Inst. Argentine Republic, XVII. 638.)

For the reception by the President of M. Bunau-Varilla, as envoy extraordinary and minister plenipotentiary from the Republic of Panama, see For. Rel. 1903, 245. In presenting his letters of credence, M. Bunau-Varilla said:

"Mr. PRESIDENT: In according to the minister plenipotentiary of the Republic of Panama the honor of presenting to you his letters of credence you admit into the family of nations the weakest and the last born of the republics of the New World.

"It owes its existence to the outburst of the indignant grief which stirred the hearts of the citizens of the Isthmus on beholding the despotic action which sought to forbid their country from fulfilling the destinies vouchsafed to it by Providence.

"In consecrating its right to exist, Mr. President, you put an end to what appeared to be the interminable controversy as to the rival waterways, and you definitely inaugurate the era of the achievement of the Panama Canal.

"From this time forth the determination of the fate of the canal depends upon two elements alone, now brought face to face, singularly unlike as regards their authority and power, but wholly equal in their common and ardent desire to see at last the accomplishment of the heroic enterprise for piercing the mountain barrier of the Andes.

"The highway from Europe to Asia, following the pathway of the sun, is now to be realized.

"The early attempts to find such a way unexpectedly resulted in the greatest of all historic achievements, the discovery of America. Centuries have since rolled by, but the pathway sought has hitherto remained in the realm of dreams. To-day, Mr. President, in response to your summons, it becomes a reality."

The President, in reply, said:

"Mr. MINISTER: I am much gratified to receive the letters whereby you are accredited to the Government of the United States in the capacity of envoy extraordinary and minister plenipotentiary of the Republic of Panama.

"In accordance with its long-established rule, this Government has taken cognizance of the act of the ancient territory of Panama in reasserting the right of self-control and, seeing in the recent events on the Isthmus an unopposed expression of the will of the people of Panama and the confirmation of

their declared independence by the institution of a *de facto* government, republican in form and spirit, and alike able and resolved to discharge the obligations pertaining to sovereignty, we have entered into relations with the new Republic. It is fitting that we should do so now, as we did nearly a century ago when the Latin peoples of America proclaimed the right of popular government, and it is equally fitting that the United States should, now as then, be the first to stretch out the hand of fellowship and to observe toward the new-born state the rules of equal intercourse that regulate the relations of sovereignties toward one another.

"I feel that I express the wish of my countrymen in assuring you, and through you the people of the Republic of Panama, of our earnest hope and desire that stability and prosperity shall attend the new state, and that, in harmony with the United States, it may be the providential instrument of untold benefit to the civilized world through the opening of a highway of universal commerce across its exceptionally favored territory.

"For yourself, Mr. Minister, I wish success in the discharge of the important mission to which you have been called."

"I lay before the Congress for its information a statement of my action up to this time in executing the act entitled  
**Special message of** 'An act to provide for the construction of a canal  
**Jan. 4, 1904.** connecting the waters of the Atlantic and Pacific oceans,' approved June 28, 1902.

"By the said act the President was authorized to secure for the United States the property of the Panama Canal Company and the perpetual control of a strip 6 miles wide across the Isthmus of Panama. It was further provided that 'should the President be unable to obtain for the United States a satisfactory title to the property of the New Panama Canal Company and the control of the necessary territory of the Republic of Colombia . . . within a reasonable time and upon reasonable terms, then the President' should endeavor to provide for a canal by the Nicaragua route. The language quoted defines with exactness and precision what was to be done, and what as a matter of fact has been done. The President was authorized to go to the Nicaragua route only if within a reasonable time he could not obtain 'control of the necessary territory of the Republic of Colombia.' This control has now been obtained; the provision of the act has been complied with; it is no longer possible under existing legislation to go to the Nicaragua route as an alternative.

"This act marked the climax of the effort on the part of the United States to secure, so far as legislation was concerned, an interoceanic canal across the Isthmus. The effort to secure a treaty for this purpose with one of the Central American republics did not stand on the same footing with the effort to secure a treaty under any ordinary conditions. The proper position for the United States to assume in reference to this canal, and therefore to the governments of the Isthmus, had been clearly set forth by Secretary Cass in 1858. In my

Annual Message I have already quoted what Secretary Cass said; but I repeat the quotation here, because the principle it states is fundamental.

"While the rights of sovereignty of the states occupying this region (Central America) should always be respected, we shall expect that these rights be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted, in a spirit of Eastern isolation, to close the gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them and that they choose to shut them, or, what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use.

"The principle thus enunciated by Secretary Cass was sound then and it is sound now. The United States has taken the position that no other government is to build the canal. In 1889, when France proposed to come to the aid of the French Panama Company by guaranteeing their bonds, the Senate of the United States in executive session, with only some three votes dissenting, passed a resolution as follows:

"That the Government of the United States will look with serious concern and disapproval upon any connection of any European government with the construction or control of any ship canal across the Isthmus of Darien or across Central America, and must regard any such connection or control as injurious to the just rights and interests of the United States and as a menace to their welfare.

"Under the Hay-Pauncefote treaty it was explicitly provided that the United States should control, police, and protect the canal which was to be built, keeping it open for the vessels of all nations on equal terms. The United States thus assumed the position of guarantor of the canal and of its peaceful use by all the world. The guarantee included as a matter of course the building of the canal. The enterprise was recognized as responding to an international need; and it would be the veriest travesty on right and justice to treat the governments in possession of the Isthmus as having the right, in the language of Mr. Cass, 'to close the gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them and that they choose to shut them.'

"When this Government submitted to Colombia the Hay-Herran treaty three things were, therefore, already settled.

"One was that the canal should be built. The time for delay, the time for permitting the attempt to be made by private enterprise, the time for permitting any government of antisocial spirit and of imperfect development to bar the work, was past. The United States had assumed in connection with the canal certain responsibilities not only to its own people, but to the civilized world, which



imperatively demanded that there should no longer be delay in beginning the work.

"Second. While it was settled that the canal should be built without unnecessary or improper delay, it was no less clearly shown to be our purpose to deal not merely in a spirit of justice but in a spirit of generosity with the people through whose land we might build it. The Hay-Herran treaty, if it erred at all, erred in the direction of an overgenerosity toward the Colombian Government. In our anxiety to be fair we had gone to the very verge in yielding to a weak nation's demands what that nation was helplessly unable to enforce from us against our will. The only criticisms made upon the Administration for the terms of the Hay-Herran treaty were for having granted too much to Colombia, not for failure to grant enough. Neither in the Congress nor in the public press, at the time that this treaty was formulated, was there complaint that it did not in the fullest and amplest manner guarantee to Colombia everything that she could by any color of title demand.

"Nor is the fact to be lost sight of that the rejected treaty, while generously responding to the pecuniary demands of Colombia, in other respects merely provided for the construction of the canal in conformity with the express requirements of the act of the Congress of June 28, 1902. By that act, as heretofore quoted, the President was authorized to acquire from Colombia, for the purposes of the canal, 'perpetual control' of a certain strip of land; and it was expressly required that the 'control' thus to be obtained should include 'jurisdiction' to make police and sanitary regulations and to establish such judicial tribunals as might be agreed on for their enforcement. These were conditions precedent prescribed by the Congress; and for their fulfillment suitable stipulations were embodied in the treaty. It has been stated in public prints that Colombia objected to these stipulations on the ground that they involved a relinquishment of her 'sovereignty;' but in the light of what has taken place, this alleged objection must be considered as an afterthought.

"In reality, the treaty, instead of requiring a cession of Colombia's sovereignty over the canal strip, expressly acknowledged, confirmed, and preserved her sovereignty over it. The treaty in this respect simply proceeded on the lines on which all the negotiations leading up to the present situation have been conducted. In those negotiations the exercise by the United States, subject to the paramount rights of the local sovereign, of a substantial control over the canal and the immediately adjacent territory, has been treated as a fundamental part of any arrangement that might be made. It has formed an essential feature of all our plans, and its necessity is fully recognized in the Hay-Pauncefote treaty. The Congress, in pro-

viding that such control should be secured, adopted no new principle, but only incorporated in its legislation a condition the importance and propriety of which were universally recognized. During all the years of negotiation and discussion that preceded the conclusion of the Hay-Herran treaty, Colombia never intimated that the requirements by the United States of control over the canal strip would render unattainable the construction of a canal by way of the Isthmus of Panama; nor were we advised, during the months when legislation of 1902 was pending before the Congress, that the terms which it embodied would render negotiations with Colombia impracticable. It is plain that no nation could construct and guarantee the neutrality of the canal with a less degree of control than was stipulated for in the Hay-Herran treaty. A refusal to grant such degree of control was necessarily a refusal to make any practicable treaty at all. Such refusal therefore squarely raised the question whether Colombia was entitled to bar the transit of the world's traffic across the Isthmus.

"That the canal itself was eagerly demanded by the people of the locality through which it was to pass, and that the people of this locality no less eagerly longed for its construction under American control, are shown by the unanimity of action in the new Panama Republic. Furthermore, Colombia, after having rejected the treaty in spite of our protests and warnings when it was in her power to accept it, has since shown the utmost eagerness to accept the same treaty if only the status quo could be restored. One of the men standing highest in the official circles of Colombia on November 6 addressed the American minister at Bogotá, saying that if the Government of the United States would land troops to preserve Colombian sovereignty and the transit, the Colombian Government would 'declare martial law; and, by virtue of vested constitutional authority, when public order is disturbed, [would] approve by decree the ratification of the canal treaty as signed; or, if the Government of the United States prefers, [would] call extra session of the Congress—with new and friendly members—next May to approve the treaty.'

"Having these facts in view, there is no shadow of question that the Government of the United States proposed a treaty which was not merely just, but generous to Colombia, which our people regarded as erring, if at all, on the side of overgenerosity; which was hailed with delight by the people of the immediate locality through which the canal was to pass, who were most concerned as to the new order of things, and which the Colombian authorities now recognize as being so good that they are willing to promise its unconditional ratification if only we will desert those who have shown themselves our friends and restore to those who have shown themselves unfriendly

the power to undo what they did. I pass by the question as to what assurance we have that they would now keep their pledge and not again refuse to ratify the treaty if they had the power; for, of course, I will not for one moment discuss the possibility of the United States committing an act of such baseness as to abandon the new Republic of Panama.

"Third. Finally, the Congress definitely settled where the canal was to be built. It was provided that a treaty should be made for building the canal across the Isthmus of Panama; and, if, after reasonable time, it proved impossible to secure such treaty, that then we should go to Nicaragua. The treaty has been made; for it needs no argument to show that the intent of the Congress was to insure a canal across Panama, and that whether the republic granting the title was called New Granada, Colombia, or Panama mattered not one whit. As events turned out, the question of 'reasonable time' did not enter into the matter at all. Although, as the months went by, it became increasingly improbable that the Colombian Congress would ratify the treaty or take steps which would be equivalent thereto, yet all chance for such action on their part did not vanish until the Congress closed at the end of October; and within three days thereafter the revolution in Panama had broken out. Panama became an independent state, and the control of the territory necessary for building the canal then became obtainable. The condition under which alone we could have gone to Nicaragua thereby became impossible of fulfillment. If the pending treaty with Panama should not be ratified by the Senate, this would not alter the fact that we could not go to Nicaragua. The Congress has decided the route, and there is no alternative under existing legislation.

"When in August it began to appear probable that the Colombian Legislature would not ratify the treaty it became incumbent upon me to consider well what the situation was and to be ready to advise the Congress as to what were the various alternatives of action open to us. There were several possibilities. One was that Colombia would at the last moment see the unwisdom of her position. That there might be nothing omitted, Secretary Hay, through the minister at Bogotá, repeatedly warned Colombia that grave consequences might follow from her rejection of the treaty. Although it was a constantly diminishing chance, yet the possibility of ratification did not wholly pass away until the close of the session of the Colombian Congress.

"A second alternative was that by the close of the session on the last day of October, without the ratification of the treaty by Colombia and without any steps taken by Panama, the American Congress on assembling early in November would be confronted with a situation in which there had been a failure to come to terms as to building the canal along the Panama route, and yet there had not been a lapse of

a reasonable time—using the word reasonable in any proper sense—such as would justify the Administration in going to the Nicaragua route. This situation seemed on the whole the most likely, and as a matter of fact I had made the original draft of my message to the Congress with a view to its existence.

“It was the opinion of eminent international jurists that in view of the fact that the great design of our guaranty under the treaty of 1846 was to dedicate the Isthmus to the purposes of interoceanic transit, and above all to secure the construction of an interoceanic canal, Colombia could not under existing conditions refuse to enter into a proper arrangement with the United States to that end without violating the spirit and substantially repudiating the obligations of a treaty the full benefits of which she had enjoyed for over fifty years. My intention was to consult the Congress as to whether under such circumstances it would not be proper to announce that the canal was to be dug forthwith; that we would give the terms that we had offered and no others; and that if such terms were not agreed to we would enter into an arrangement with Panama direct, or take what other steps were needful in order to begin the enterprise.

“A third possibility was that the people of the Isthmus, who had formerly constituted an independent state, and who until recently were united to Colombia only by a loose tie of federal relationship, might take the protection of their own vital interests into their own hands, reassert their former rights, declare their independence upon just grounds, and establish a government competent and willing to do its share in this great work for civilization. This third possibility is what actually occurred. Everyone knew that it was a possibility, but it was not until toward the end of October that it appeared to be an imminent probability. Although the Administration, of course, had special means of knowledge, no such means were necessary in order to appreciate the possibility, and toward the end the likelihood, of such a revolutionary outbreak and of its success. It was a matter of common notoriety. Quotations from the daily papers could be indefinitely multiplied to show this state of affairs; a very few will suffice. From Costa Rica on August 31 a special was sent to the Washington Post, running as follows:

“SAN JOSÉ, COSTA RICA, August 31.

“Travelers from Panama report the Isthmus alive with fires of a new revolution. It is inspired, it is believed, by men who, in Panama and Colon, have systematically engendered the pro-American feeling to secure the building of the Isthmian canal by the United States.

“The Indians have risen, and the late followers of Gen. Benjamin Herrera are mustering in the mountain villages preparatory to joining in an organized revolt, caused by the rejection of the canal treaty.

“Hundreds of stacks of arms, confiscated by the Colombian Government at the close of the late revolution, have reappeared from some mysterious source, and thousands of rifles that look suspiciously like the Mausers the United States captured in Cuba are issuing

to the gathering forces from central points of distribution. With the arms goes ammunition, fresh from factories, showing the movement is not spasmodic, but is carefully planned.

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"The Government forces in Panama and Colon, numbering less than 1,500 men, are reported to be a little more than friendly to the revolutionary spirit. They have been ill paid since the revolution closed and their only hope of prompt payment is another war.

"General Huertes, commander of the forces, who is ostensibly loyal to the Bogotá Government, is said to be secretly friendly to the proposed revolution. At least, all his personal friends are open in denunciation of the Bogotá Government and the failure of the Colombian Congress to ratify the canal treaty.

"The consensus of opinion gathered from late arrivals from the Isthmus is that the revolution is coming, and that it will succeed.

"A special dispatch to the Washington Post, under date of New York, September 1, runs as follows:

"B. G. Duque, editor and proprietor of the Panama Star and Herald, a resident of the Isthmus during the past twenty-seven years, who arrived to-day in New York, declared that if the canal treaty fell through a revolution would be likely to follow.

"'There is a very strong feeling in Panama,' said Mr. Duque, 'that Colombia, in negotiating the sale of a canal concession in Panama, is looking for profits that might just as well go to Panama herself.

"'The Colombian Government only the other day suppressed a newspaper that dared to speak of independence for Panama. A while ago there was a secret plan afoot to cut loose from Colombia and seek the protection of the United States.'

"In the New York Herald of September 10 the following statement appeared:

"Representatives of strong interests on the Isthmus of Panama who make their headquarters in this city are considering a plan of action to be undertaken in cooperation with men of similar views in Panama and Colon to bring about a revolution and form an independent government in Panama opposed to that in Bogotá.

"There is much indignation on the Isthmus on account of the failure of the canal treaty, which is ascribed to the authorities at Bogotá. This opinion is believed to be shared by a majority of the isthmians of all shades of political belief, and they think it is to their best interest for a new republic to be formed on the Isthmus, which may negotiate directly with the United States a new treaty which will permit the digging of the Panama Canal under favorable conditions.

"In the New York Times, under date of September 13, there appeared from Bogotá the following statement:

"A proposal made by Señor Perez y Sotos to ask the Executive to appoint an anti-secessionist governor in Panama has been approved by the Senate. Speakers in the Senate said that Señor Obaldía, who was recently appointed governor of Panama, and who is favorable to a canal treaty, was a menace to the national integrity. Senator Marroquín protested against the action of the Senate.

"President Marroquín succeeded later in calming the Congressmen. It appears that he was able to give them satisfactory reasons for Governor Obaldía's appointment. He appears to realize the imminent peril of the Isthmus of Panama declaring its independence.

"Señor Deroux, representative for a Panama constituency, recently delivered a sensational speech in the House. Among other things he said:

"'In Panama the bishops, governors, magistrates, military chiefs, and their subordinates have been and are foreign to the department. It seems that the Government, with

surprising tenacity, wishes to exclude the Isthmus from all participation in public affairs. As regards international dangers in the Isthmus, all I can say is that if these dangers exist they are due to the conduct of the National Government, which is in the direction of reaction.

“ ‘ If the Colombian Government will not take action with a view to preventing disaster, the responsibility will rest with it alone.’ ”

“In the New York Herald of October 26 it was reported that a revolutionary expedition of about 70 men had actually landed on the Isthmus. In the Washington Post of October 29 it was reported from Panama that in view of the impending trouble on the Isthmus the Bogotá Government had gathered troops in sufficient numbers to at once put down an attempt at secession. In the New York Herald of October 30 it was announced from Panama that Bogotá was hurrying troops to the Isthmus to put down the projected revolt. In the New York Herald of November 2 it was announced that in Bogotá the Congress had endorsed the energetic measures taken to meet the situation on the Isthmus and that 6,000 men were about to be sent thither.

“Quotations like the above could be multiplied indefinitely. Suffice it to say that it was notorious that revolutionary trouble of a serious nature was impending upon the Isthmus. But it was not necessary to rely exclusively upon such general means of information. On October 15 Commander Hubbard, of the Navy, notified the Navy Department that, though things were quiet on the Isthmus, a revolution had broken out in the State of Cauca. On October 16, at the request of Lieutenant-General Young, I saw Capt. C. B. Humphrey and Lieut. Grayson Mallet-Prevost Murphy, who had just returned from a four months' tour through the northern portions of Venezuela and Colombia. They stopped in Panama on their return in the latter part of September. At the time they were sent down there had been no thought of their going to Panama, and their visit to the Isthmus was but an unpremeditated incident of their return journey; nor had they been spoken to by anyone at Washington regarding the possibility of a revolt. Until they landed at Colon they had no knowledge that a revolution was impending, save what they had gained from the newspapers. What they saw in Panama so impressed them that they reported thereon to Lieutenant-General Young, according to his memorandum—

“ that while on the Isthmus they became satisfied beyond question that, owing largely to the dissatisfaction because of the failure of Colombia to ratify the Hay-Herran treaty, a revolutionary party was in course of organization, having for its object the separation of the State of Panama from Colombia, the leader being Dr. Richard Arango, a former governor of Panama; that when they were on the Isthmus, arms and ammunition were being smuggled into the city of Colon in piano boxes, merchandise crates, etc., the small arms received being principally the Gras French rifle, the Remington, and the Mauser; that nearly every citizen in Panama had some sort of rifle or gun in his possession, with ammunition therefor; that in the city of Panama there had been organized a fire brigade which

was really intended for a revolutionary military organization; that there were representatives of the revolutionary organization at all important points on the Isthmus; that in Panama, Colon, and the other principal places of the Isthmus police forces had been organized which were in reality revolutionary forces; that the people on the Isthmus seemed to be unanimous in their sentiment against the Bogotá Government, and their disgust over the failure of that Government to ratify the treaty providing for the construction of the canal, and that a revolution might be expected immediately upon the adjournment of the Colombian Congress without ratification of the treaty.

"Lieutenant-General Young regarded their report as of such importance as to make it advisable that I should personally see these officers. They told me what they had already reported to the Lieutenant-General, adding that on the Isthmus the excitement was seething, and that the Colombian troops were reported to be disaffected. In response to a question of mine they informed me that it was the general belief that the revolution might break out at any moment, and if it did not happen before would doubtless take place immediately after the closing of the Colombian Congress (at the end of October) if the canal treaty were not ratified. They were certain that the revolution would occur, and before leaving the Isthmus had made their own reckoning as to the time, which they had set down as being probably from three to four weeks after their leaving. The reason they set this as the probable inside limit of time was that they reckoned that it would be at least three or four weeks—say not until October 20—before a sufficient quantity of arms and munitions would have been landed.

"In view of all these facts I directed the Navy Department to issue instructions such as would insure our having ships within easy reach of the Isthmus in the event of need arising. Orders were given on October 19 to the *Boston* to proceed to San Juan del Sur, Nicaragua; to the *Dixie* to prepare to sail from League Island, and to the *Atlanta* to proceed to Guantanamo. On October 30 the *Nashville* was ordered to proceed to Colon. On November 2, when, the Colombian Congress having adjourned, it was evident that the outbreak was imminent, and when it was announced that both sides were making ready forces whose meeting would mean bloodshed and disorder, the Colombian troops having been embarked on vessels, the following instructions were sent to the commanders of the *Boston*, *Nashville*, and *Dixie*:

"Maintain free and uninterrupted transit. If interruption is threatened by armed force, occupy the line of railroad. Prevent landing of any armed force with hostile intent, either government or insurgent, at any point within 50 miles of Panama. Government force reported approaching the Isthmus in vessels. Prevent their landing if, in your judgment, the landing would precipitate a conflict.

"These orders were delivered in pursuance of the policy on which our Government had repeatedly acted. This policy was exhibited in the following orders, given under somewhat similar circumstances last year, and the year before, and the year before that. The first

two telegrams are from the Department of State to the consul at Panama:

" JULY 25, 1900.

" You are directed to protest against any act of hostility which may involve or imperil the safe and peaceful transit of persons or property across the Isthmus of Panama. The bombardment of Panama would have this effect, and the United States must insist upon the neutrality of the Isthmus as guaranteed by the treaty.

" NOVEMBER 20, 1901.

" Notify all parties molesting or interfering with free transit across the Isthmus that such interference must cease and that the United States will prevent the interruption of traffic upon the railroad. Consult with captain of the *Ioua*, who will be instructed to land marines, if necessary, for the protection of the railroad, in accordance with the treaty rights and obligations of the United States. Desirable to avoid bloodshed, if possible.

" The next three telegrams are from and to the Secretary of the Navy:

" SEPTEMBER 12, 1902.

" RANGER, *Panama*:

" United States guarantees perfect neutrality of Isthmus and that a free transit from sea to sea be not interrupted or embarrassed. . . . Any transportation of troops which might contravene these provisions of treaty should not be sanctioned by you nor should use of road be permitted which might convert the line of transit into theater of hostility.

" MOODY.

" COLON, *September 20, 1902.*

" SECRETARY OF THE NAVY, *Washington*:

" Everything is conceded. The United States guards and guarantees traffic and the line of transit. To-day I permitted the exchange of Colombian troops from Panama to Colon, about 1,000 men each way, the troops without arms in trains guarded by American naval force in the same manner as other passengers; arms and ammunition in separate train, guarded also by naval force in the same manner as other freight.

" McLEAN.

" PANAMA, *October 3, 1902.*

" SECRETARY OF THE NAVY, *Washington, D. C.*:

" Have sent this communication to the American consul at Panama:

" ' Inform governor while trains running under United States protection I must decline transportation any combatants, ammunition, arms, which might cause interruption traffic or convert line of transit into theater hostilities.'

" CASEY.

" On November 3 Commander Hubbard responded to the above-quoted telegram of November 2, 1903, saying that before the telegram had been received 400 Colombian troops from Cartagena had landed at Colon; that there had been no revolution on the Isthmus, but that the situation was most critical if the revolutionary leaders should act. On this same date the Associated Press in Washington received a bulletin stating that a revolutionary outbreak had occurred. When this was brought to the attention of the Assistant Secretary of State, Mr. Loomis, he prepared the following cablegram to the consul-general at Panama and the consul at Colon:

" Uprising on Isthmus reported. Keep Department promptly and fully informed.



"Before this telegram was sent, however, one was received from Consul Malmros at Colon, running as follows:

"Revolution imminent. Government force on the Isthmus about 500 men. Their official promised support revolution. Fire department, Panama, 441, are well organized and favor revolution. Government vessel, *Cartagena*, with about 400 men, arrived early to-day with new commander in chief, Tobar. Was not expected until November 10. Tobar's arrival is not probable to stop revolution.

"This cablegram was received at 2.35 p. m., and at 3.40 p. m. Mr. Loomis sent the telegram which he had already prepared to both Panama and Colon. Apparently, however, the consul-general at Panama had not received the information embodied in the Associated Press bulletin, upon which the Assistant Secretary of State based his dispatch, for his answer was that there was no uprising, although the situation was critical, this answer being received at 8.15 p. m. Immediately afterwards he sent another dispatch, which was received at 9.50 p. m., saying that the uprising had occurred, and had been successful, with no bloodshed. The Colombian gunboat *Bogotá* next day began to shell the city of Panama, with the result of killing one Chinaman. The consul-general was directed to notify her to stop firing. Meanwhile, on November 4, Commander Hubbard notified the Department that he had landed a force to protect the lives and property of American citizens against the threats of the Colombian soldiery.

"Before any step whatever had been taken by the United States troops to restore order, the commander of the newly landed Colombian troops had indulged in wanton and violent threats against American citizens, which created serious apprehension. As Commander Hubbard reported in his letter of November 5, this officer and his troops practically began war against the United States, and only the forbearance and coolness of our officers and men prevented bloodshed. The letter of Commander Hubbard is of such interest that it deserves quotation in full, and runs as follows:

"U. S. S. NASHVILLE, THIRD RATE,

"Colon, U. S. Colombia, November 5, 1903.

"SIR: Pending a complete report of the occurrences of the last three days in Colon, Colombia, I most respectfully invite the Department's attention to those of the date of Wednesday, November 4, which amounted to practically the making of war against the United States by the officer in command of the Colombian troops in Colon. At 1 o'clock p. m. on that date I was summoned on shore by a preconcerted signal, and on landing met the United States consul, vice-consul, and Colonel Shaler, the general superintendent of the Panama Railroad. The consul informed me that he had received notice from the officer commanding the Colombian troops, Colonel Torres, through the prefect of Colon, to the effect that if the Colombian officers, Generals Tobal and Amaya, who had been seized in Panama on the evening of the 3d of November by the Independents and held as prisoners, were not released by 2 o'clock p. m. he, Torres, would open fire on the town of Colon and kill every United States citizen in the place, and my advice and action were requested. I advised that all the United States citizens should take refuge in the shed of the Panama Rail-

road Company, a stone building susceptible of being put into good state for defense, and that I would immediately land such body of men, with extra arms for arming the citizens, as the complement of the ship would permit. This was agreed to and I immediately returned on board, arriving at 1.15 p. m. The order for landing was immediately given, and at 1.30 p. m. the boats left the ship with a party of 42 men under the command of Lieut. Commander H. M. Witzel, with Midshipman J. P. Jackson as second in command. Time being pressing, I gave verbal orders to Mr. Witzel to take the building above referred to, to put it into the best state of defense possible, and protect the lives of the citizens assembled there—not firing unless fired upon. The women and children took refuge on the German steamer *Marcomania* and Panama Railroad steamer *City of Washington*, both ready to haul out from dock if necessary. The *Nashville* I got under way and patrolled with her along the water front close in and ready to use either small arm or shrapnel fire. The Colombians surrounded the building of the railroad company almost immediately after we had taken possession, and for about one and a half hours their attitude was most threatening, it being seemingly their purpose to provoke an attack. Happily our men were cool and steady, and while the tension was very great no shot was fired. At about 3.15 p. m. Colonel Torres came into the building for an interview and expressed himself as most friendly to Americans, claiming that the whole affair was a misapprehension and that he would like to send the alcalde of Colon to Panama to see General Tobal and have him direct the discontinuance of the show of force. A special train was furnished and safe conduct guaranteed. At about 5.30 p. m. Colonel Torres made the proposition of withdrawing his troops to Monkey Hill if I would withdraw the *Nashville's* force and leave the town in possession of the police until the return of the alcalde on the morning of the 5th. After an interview with the United States consul and Colonel Shaler as to the probability of good faith in the matter, I decided to accept the proposition and brought my men on board, the disparity in numbers between my force and that of the Colombians, nearly ten to one, making me desirous of avoiding a conflict so long as the object in view, the protection of American citizens, was not imperiled.

"I am positive that the determined attitude of our men, their coolness and evident intention of standing their ground, had a most salutary and decisive effect on the immediate situation and was the initial step in the ultimate abandoning of Colon by these troops and their return to Cartagena the following day. Lieutenant-Commander Witzel is entitled to much praise for his admirable work in command on the spot.

"I feel that I can not sufficiently strongly represent to the Department the grossness of this outrage and the insult to our dignity, even apart from the savagery of the threat.

"Very respectfully,

"JOHN HUBBARD,

"Commander, U. S. Navy, Commanding.

"The SECRETARY OF THE NAVY,

"Navy Department, Washington, D. C.

"In his letter of November 8 Commander Hubbard sets forth the facts more in detail:

"U. S. S. NASHVILLE, THIRD RATE,

"Porto Bello, U. S. Colombia, November 8, 1903.

"SIR: 1. I have the honor to make the following report of the occurrences which took place at Colon and Panama in the interval between the arrival of the *Nashville* at Colon on the evening of November 2, 1903, and evening of November 5, 1903, when, by the arrival of the U. S. S. *Dixie*, at Colon, I was relieved as senior officer by Commander F. H. Delano, U. S. Navy.

"2. At the time of the arrival of the *Nashville* at Colon at 5.30 p. m. on November 2 everything on the Isthmus was quiet. There was talk of proclaiming the independence of Panama, but no definite action had been taken, and there had been no disturbance of peace and order. At daylight on the morning of November 3 it was found that a vessel which had

come in during the night was the Colombian gunboat *Cartagena*, carrying between 400 and 500 troops. I had her boarded, and learned that these troops were for the garrison at Panama. Inasmuch as the Independent party had not acted and the Government of Colombia was at the time in undisputed control of the province of Panama, I did not feel, in the absence of any instructions, that I was justified in preventing the landing of these troops, and at 8.30 o'clock they were disembarked. The commanding officers, Generals Amaya and Tobal, with four others, immediately went over to Panama to make arrangements for receiving and quartering their troops, leaving the command in charge of an officer whom I later learned to be Colonel Torres. The Department's message addressed to the care of the United States consul I received at 10.30 a. m. It was delivered to one of the ship's boats while I was at the consul's, and not to the consul, as addressed. The message was said to have been received at the cable office at 9.30 a. m. Immediately on deciphering the message I went on shore to see what arrangements the railroad company had made for the transportation of these troops to Panama, and learned that the company would not transport them except on request of the governor of Panama, and that the prefect at Colon and the officer left in command of the troops had been so notified by the general superintendent of the Panama Railroad Company. I remained at the company's office until it was sure that no action on my part would be needed to prevent the transportation of the troops that afternoon, when I returned on board and cabled the Department the situation of affairs. At about 5.30 p. m. I again went on shore, and received notice from the general superintendent of the railroad that he had received the request for the transportation of the troops and that they would leave on the 8 a. m. train on the following day. I immediately went to see the general superintendent, and learned that it had just been announced that a provisional government had been established at Panama; that Generals Amaya and Tobal, the governor of Panama, and four officers who had gone to Panama in the morning had been seized and were held as prisoners; that they had an organized force of 1,500 troops, and wished the Government troops in Colon to be sent over. This I declined to permit, and verbally prohibited the general superintendent from giving transportation to the troops of either party.

"It being then late in the evening, I sent early in the morning of November 4 written notification to the general superintendent of the Panama Railroad, to the prefect of Colon, and to the officer left in command of the Colombian troops, later ascertained to be Colonel Torres, that I had prohibited the transportation of troops in either direction, in order to preserve the free and uninterrupted transit of the Isthmus. Copies of these letters are hereto appended; also copy of my notification to the consul. Except to a few people, nothing was known in Colon of the proceedings in Panama until the arrival of the train at 10.45 on the morning of the 4th. Some propositions were, I was later told, made to Colonel Torres by the representatives of the new Government at Colon, with a view to inducing him to reembark in the *Cartagena* and return to the port of Cartagena, and it was in answer to this proposition that Colonel Torres made the threat and took the action reported in my letter No. 96, of November 5, 1903. The *Cartagena* left the port just after the threat was made, and I did not deem it expedient to attempt to detain her, as such action would certainly, in the then state of affairs, have precipitated a conflict on shore which I was not prepared to meet. It is my understanding that she returned to Cartagena. After the withdrawal of the Colombian troops on the evening of November 4, and the return of the *Nashville's* force on board, as reported in my letter No. 96, there was no disturbance on shore, and the night passed quietly. On the morning of the 5th I discovered that the commander of the Colombian troops had not withdrawn so far from the town as he had agreed, but was occupying buildings near the outskirts of the town. I immediately inquired into the matter and learned that he had some trivial excuse for not carrying out his agreement, and also that it was his intention to occupy Colon again on the arrival of the alcalde due at 10.45 a. m., unless General Tobal sent word by the alcalde that he, Colonel Torres, should withdraw. That General Tobal had declined to give any instructions I was cognizant of, and the situation at once became quite as serious as on the day previous. I immediately

landed an armed force, reoccupied the same building; also landed two 1-pounders and mounted them on platform cars behind protection of cotton bales, and then in company with the United States consul had an interview with Colonel Torres, in the course of which I informed him that I had relanded my men because he had not kept his agreement: that I had no interest in the affairs of either party; that my attitude was strictly neutral; that the troops of neither side should be transported; that my sole purpose in landing was to protect the lives and property of American citizens if threatened, as they had been threatened, and to maintain the free and uninterrupted transit of the Isthmus, and that purpose I should maintain by force if necessary. I also strongly advised that in the interests of peace, and to prevent the possibility of a conflict that could not but be regrettable, he should carry out his agreement of the previous evening and withdraw to Monkey Hill.

"Colonel Torres' only reply was that it was unhealthy at Monkey Hill, a reiteration of his love of Americans, and persistence in his intention to occupy Colon, should General Tobal not give him directions to the contrary.

"On the return of the alcalde at about 11 a. m. the Colombian troops marched into Colon, but did not assume the threatening demeanor of the previous day. The American women and children again went on board the *Marcomania* and *City of Washington*, and through the British vice-consul I offered protection to British subjects as directed in the Department's cablegram. A copy of the British vice-consul's acknowledgement is hereto appended. The *Nashville* I got under way as on the previous day and moved close in to protect the water front. During the afternoon several propositions were made to Colonel Torres by the representatives of the new Government, and he was finally persuaded by them to embark on the Royal Mail steamer *Orinoco* with all his troops and return to Cartagena. The *Orinoco* left her dock with the troops—474 all told—at 7.35 p. m. The *Dirie* arrived and anchored at 7.05 p. m., when I went on board and acquainted the commanding officer with the situation. A portion of the marine battalion was landed and the *Nashville's* force withdrawn.

"3. On the evening of November 4, Maj. William M. Black and Lieut. Mark Brooke, Corps of Engineers, U. S. Army, came to Colon from Culebra and volunteered their services, which were accepted, and they rendered very efficient help on the following day.

"4. I beg to assure the Department that I had no part whatever in the negotiations that were carried on between Colonel Torres and the representatives of the provisional government; that I landed an armed force only when the lives of American citizens were threatened, and withdrew this force as soon as there seemed to be no grounds for further apprehension of injury to American lives or property; that I relanded an armed force because of the failure of Colonel Torres to carry out his agreement to withdraw and announced intention of returning, and that my attitude throughout was strictly neutral as between the two parties, my only purpose being to protect the lives and property of American citizens and to preserve the free and uninterrupted transit of the Isthmus.

"Very respectfully,

JOHN HUBBARD,

"Commander, U. S. Navy, Commanding.

"The SECRETARY OF THE NAVY,

"Bureau of Navigation, Navy Department, Washington, D. C.

"This plain official account of the occurrences of November 4, shows that, instead of there having been too much prevision by the American Government for the maintenance of order and the protection of life and property on the Isthmus, the orders for the movement of the American war ships had been too long delayed; so long, in fact, that there were but 42 marines and sailors available to land and protect the lives of American men and women. It was only the coolness and gallantry with which this little band of men wearing the American uniform faced ten times their number of armed foes,

bent on carrying out the atrocious threat of the Colombian commander, that prevented a murderous catastrophe. At Panama, when the revolution broke out, there was no American man-of-war and no American troops or sailors. At Colon, Commander Hubbard acted with entire impartiality toward both sides, preventing any movement, whether by the Colombians or the Panamans, which would tend to produce bloodshed. On November 9 he prevented a body of the revolutionists from landing at Colon. Throughout he behaved in the most creditable manner. In the *New York Evening Post*, under date of Panama, December 8, there is an article from a special correspondent, which sets forth in detail the unbearable oppression of the Colombian government in Panama. In this article is an interesting interview with a native Panaman, which runs in part as follows:

"... We looked upon the building of the canal as a matter of life or death to us. We wanted that because it meant, with the United States in control of it, peace and prosperity for us. President Marroquin appointed an Isthmian to be governor of Panama, and we looked upon that as of happy augury. Soon we heard that the canal treaty was not likely to be approved at Bogotá; next we heard that our Isthmian governor, Obaldía, who had scarcely assumed power, was to be superseded by a soldier from Bogotá. . . .

"Notwithstanding all that Colombia has drained us of in the way of revenues, she did not bridge for us a single river, nor make a single roadway, nor erect a single college where our children could be educated, nor do anything at all to advance our industries. . . . Well, when the new generals came we seized them, arrested them, and the town of Panama was in joy. Not a protest was made, except the shots fired from the Colombian gunboat *Bogotá*, which killed one Chinese lying in his bed. We were willing to encounter the Colombian troops at Colon and fight it out, but the commander of the United States cruiser *Nashville* forbade Superintendent Shaler to allow the railroad to transport troops for either party. That is our story.

"I call especial attention to the concluding portion of this interview which states the willingness of the Panama people to fight the Colombian troops and the refusal of Commander Hubbard to permit them to use the railroad and therefore to get into a position where the fight could take place. It thus clearly appears that the fact that there was no bloodshed on the Isthmus was directly due—and only due—to the prompt and firm enforcement by the United States of its traditional policy. During the past forty years revolutions and attempts at revolutions have succeeded one another with monotonous regularity on the Isthmus, and again and again United States sailors and marines have been landed as they were landed in this instance and under similar instructions to protect the transit. One of these revolutions resulted in three years of warfare; and the aggregate of bloodshed and misery caused by them has been incalculable.

"The fact that in this last revolution not a life was lost, save that of the man killed by the shells of the Colombian gunboat, and no property destroyed, was due to the action which I have described.

We, in effect, policed the Isthmus in the interest of its inhabitants and of our own national needs, and for the good of the entire civilized world. Failure to act as the Administration acted would have meant great waste of life, great suffering, great destruction of property; all of which was avoided by the firmness and prudence with which Commander Hubbard carried out his orders and prevented either party from attacking the other. Our action was for the peace both of Colombia and of Panama. It is earnestly to be hoped that there will be no unwise conduct on our part which may encourage Colombia to embark on a war which can not result in her regaining control of the Isthmus, but which may cause much bloodshed and suffering.

"I hesitate to refer to the injurious insinuations which have been made of complicity by this Government in the revolutionary movement in Panama. They are as destitute of foundation as of propriety. The only excuse for my mentioning them is the fear lest unthinking persons might mistake for acquiescence the silence of mere self-respect. I think proper to say, therefore, that no one connected with this Government had any part in preparing, inciting, or encouraging the late revolution on the Isthmus of Panama, and that save from the reports of our military and naval officers, given above, no one connected with this Government had any previous knowledge of the revolution except such as was accessible to any person of ordinary intelligence who read the newspapers and kept up a current acquaintance with public affairs.

"By the unanimous action of its people, without the firing of a shot—with a unanimity hardly before recorded in any similar case—the people of Panama declared themselves an independent republic. Their recognition by this Government was based upon a state of facts in no way dependent for its justification upon our action in ordinary cases. I have not denied, nor do I wish to deny, either the validity or the propriety of the general rule that a new state should not be recognized as independent till it has shown its ability to maintain its independence. This rule is derived from the principle of non-intervention, and as a corollary of that principle has generally been observed by the United States. But, like the principle from which it is deduced, the rule is subject to exceptions; and there are in my opinion clear and imperative reasons why a departure from it was justified and even required in the present instance. These reasons embrace, first, our treaty rights; second, our national interests and safety; and, third, the interests of collective civilization.

"I have already adverted to the treaty of 1846, by the thirty-fifth article of which the United States secured the right to a free and open transit across the Isthmus of Panama, and to that end agreed to guarantee to New Granada her rights of sovereignty and property

over that territory. This article is sometimes discussed as if the latter guarantee constituted its sole object and bound the United States to protect the sovereignty of New Granada against domestic revolution. Nothing, however, could be more erroneous than this supposition. That our wise and patriotic ancestors, with all their dread of entangling alliances, would have entered into a treaty with New Granada solely or even primarily for the purpose of enabling that remnant of the original Republic of Colombia, then resolved into the States of New Granada, Venezuela, and Ecuador, to continue from Bogotá to rule over the Isthmus of Panama, is a conception that would in itself be incredible, even if the contrary did not clearly appear. It is true that since the treaty was made the United States has again and again been obliged forcibly to intervene for the preservation of order and the maintenance of an open transit, and that this intervention has usually operated to the advantage of the titular Government of Colombia, but it is equally true that the United States in intervening, with or without Colombia's consent, for the protection of the transit, has disclaimed any duty to defend the Colombian Government against domestic insurrection or against the erection of an independent government on the Isthmus of Panama. The attacks against which the United States engaged to protect New Granadian sovereignty were those of foreign powers; but this engagement was only a means to the accomplishment of a yet more important end. The great design of the article was to assure the dedication of the Isthmus to the purposes of free and unobstructed interoceanic transit, the consummation of which would be found in an interoceanic canal. To the accomplishment of this object the Government of the United States had for years directed its diplomacy. It occupied a place in the instructions to our delegates to the Panama Congress during the Administration of John Quincy Adams. It formed the subject of a resolution of the Senate in 1835, and of the House of Representatives in 1839. In 1846 its importance had become still more apparent by reason of the Mexican war. If the treaty of 1846 did not in terms bind New Granada to grant reasonable concessions for the construction of means of interoceanic communication, it was only because it was not imagined that such concessions would ever be withheld. As it was expressly agreed that the United States, in consideration of its onerous guarantee of New Granadian sovereignty, should possess the right of free and open transit on any modes of communication that might be constructed, the obvious intent of the treaty rendered it unnecessary, if not superfluous, in terms to stipulate that permission for the construction of such modes of communication should not be denied.

“Long before the conclusion of the Hay-Herran treaty the course of events had shown that a canal to connect the Atlantic and Pacific

oceans must be built by the United States or not at all. Experience had demonstrated that private enterprise was utterly inadequate for the purpose; and a fixed policy, declared by the United States on many memorable occasions, and supported by the practically unanimous voice of American opinion, had rendered it morally impossible that the work should be undertaken by European powers, either singly or in combination. Such were the universally recognized conditions on which the legislation of the Congress was based, and on which the late negotiations with Colombia were begun and concluded. Nevertheless, when the well-considered agreement was rejected by Colombia and the revolution on the Isthmus ensued, one of Colombia's first acts was to invoke the intervention of the United States; nor does her invitation appear to have been confined to this Government alone. By a telegram from Mr. Arthur M. Beaupré, our minister at Bogotá, of the 7th of November last, we were informed that General Reyes would soon leave Panama invested with full powers; that he had telegraphed the President of Mexico to ask the Government of the United States and all countries represented at the Pan-American Conference 'to aid Colombia to preserve her integrity,' and that he had requested that the Government of the United States should meanwhile 'preserve the neutrality and transit of the Isthmus' and should 'not recognize the new government.' In another telegram from Mr. Beaupré, which was sent later in the day, this Government was asked whether it would take action 'to maintain Colombian right and sovereignty on the Isthmus in accordance with article 35 [of] the treaty of 1846' in case the Colombian Government should be 'entirely unable to suppress the secession movement there.' Here was a direct solicitation to the United States to intervene for the purpose of suppressing, contrary to the treaty of 1846 as this Government has uniformly construed it, a new revolt against Colombia's authority brought about by her own refusal to permit the fulfillment of the great design for which that treaty was made. It was under these circumstances that the United States, instead of using its forces to destroy those who sought to make the engagements of the treaty a reality, recognized them as the proper custodians of the sovereignty of the Isthmus.

"This recognition was, in the second place, further justified by the highest considerations of our national interests and safety. In all the range of our international relations, I do not hesitate to affirm that there is nothing of greater or more pressing importance than the construction of an interoceanic canal. Long acknowledged to be essential to our commercial development, it has become, as the result of the recent extension of our territorial dominion, more than ever essential to our national self-defense. In transmitting to the



Senate the treaty of 1846, President Polk pointed out as the principal reason for its ratification that the passage of the Isthmus, which it was designed to secure, 'would relieve us from a long and dangerous navigation of more than 9,000 miles around Cape Horn, and render our communication with our own possessions on the northwest coast of America comparatively easy and speedy.' The events of the past five years have given to this consideration an importance immeasurably greater than it possessed in 1846. In the light of our present situation, the establishment of easy and speedy communication by sea between the Atlantic and the Pacific presents itself not simply as something to be desired, but as an object to be positively and promptly attained. Reasons of convenience have been superseded by reasons of vital necessity, which do not admit of indefinite delays.

"To such delays the rejection by Colombia of the Hay-Herran treaty directly exposed us. As proof of this fact I need only refer to the programme outlined in the report of the majority of the Panama canal committee, read in the Colombian Senate on the 14th of October last. In this report, which recommended that the discussion of a law to authorize the Government to enter upon new negotiations should be indefinitely postponed, it is proposed that the consideration of the subject should be deferred till October 31, 1904, when the next Colombian Congress should have met in ordinary session. By that time, as the report goes on to say, the extension of time granted to the New Panama Canal Company by treaty in 1893 would have expired, and the new Congress would be in a position to take up the question whether the company had not, in spite of further extensions that had been granted by legislative acts, forfeited all its property and rights. 'When that time arrives,' the report significantly declares, 'the Republic, without any impediment, will be able to contract, and will be in more clear, more definite, and more advantageous possession, both legally and materially.' The naked meaning of this report is that Colombia proposed to wait until, by the enforcement of a forfeiture repugnant to the ideas of justice which obtain in every civilized nation, the property and rights of the New Panama Canal Company could be confiscated.

"Such is the scheme to which it was proposed that the United States should be invited to become a party. The construction of the canal was to be relegated to the indefinite future, while Colombia was, by reason of her own delay, to be placed in the 'more advantageous' position of claiming not merely the compensation to be paid by the United States for the privilege of completing the canal, but also the forty millions authorized by the act of 1902 to be paid for the property of the New Panama Canal Company. That the attempt to carry out this scheme would have brought Colombia

into conflict with the Government of France can not be doubted; nor could the United States have counted upon immunity from the consequences of the attempt, even apart from the indefinite delays to which the construction of the canal was to be subjected. On the first appearance of danger to Colombia, this Government would have been summoned to interpose, in order to give effect to the guarantees of the treaty of 1846; and all this in support of a plan which, while characterized in its first stage by the wanton disregard of our own highest interests, was fitly to end in further injury to the citizens of a friendly nation, whose enormous losses in their generous efforts to pierce the Isthmus have become a matter of history.

“In the third place, I confidently maintain that the recognition of the Republic of Panama was an act justified by the interests of collective civilization. If ever a Government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal. Since our purpose to build the canal was definitely announced, there have come from all quarters assurances of approval and encouragement, in which even Colombia herself at one time participated; and to general assurances were added specific acts and declarations. In order that no obstacle might stand in our way, Great Britain renounced important rights under the Clayton-Bulwer treaty and agreed to its abrogation, receiving in return nothing but our honorable pledge to build the canal and protect it as an open highway. It was in view of this pledge, and of the proposed enactment by the Congress of the United States of legislation to give it immediate effect, that the second Pan-American Conference, at the City of Mexico, on January 22, 1902, adopted the following resolution:

“The Republics assembled at the International Conference of Mexico applaud the purpose of the United States Government to construct an interoceanic canal, and acknowledge that this work will not only be worthy of the greatness of the American people, but also in the highest sense a work of civilization, and to the greatest degree beneficial to the development of commerce between the American States and the other countries of the world.

“Among those who signed this resolution on behalf of their respective governments was General Reyes, the delegate of Colombia. Little could it have been foreseen that two years later the Colombian Government, led astray by false allurements of selfish advantage, and forgetful alike of its international obligations and of the duties and responsibilities of sovereignty, would thwart the efforts of the United States to enter upon and complete a work which the nations of America, reechoing the sentiment of the nations of Europe, had pronounced to be not only ‘worthy of the greatness of the American people,’ but also ‘in the highest sense a work of civilization.’

That our position as the mandatary of civilization has been by no means misconceived is shown by the promptitude with which the powers have, one after another, followed our lead in recognizing Panama as an independent State. Our action in recognizing the new Republic has been followed by like recognition on the part of France, Germany, Denmark, Russia, Sweden and Norway, Nicaragua, Peru, China, Cuba, Great Britain, Italy, Costa Rica, Japan, and Austria-Hungary.

“In view of the manifold considerations of treaty right and obligation, of national interest and safety, and of collective civilization, by which our Government was constrained to act, I am at a loss to comprehend the attitude of those who can discern in the recognition of the Republic of Panama only a general approval of the principle of ‘revolution’ by which a given government is overturned or one portion of a country separated from another. Only the amplest justification can warrant a revolutionary movement of either kind. But there is no fixed rule which can be applied to all such movements. Each case must be judged on its own merits. There have been many revolutionary movements, many movements for the dismemberment of countries, which were evil, tried by any standard. But in my opinion no disinterested and fair-minded observer acquainted with the circumstances can fail to feel that Panama had the amplest justification for separation from Colombia under the conditions existing, and, moreover, that its action was in the highest degree beneficial to the interests of the entire civilized world by securing the immediate opportunity for the building of the interoceanic canal. It would be well for those who are pessimistic as to our action in peacefully recognizing the Republic of Panama, while we lawfully protected the transit from invasion and disturbance, to recall what has been done in Cuba, where we intervened even by force on general grounds of national interest and duty. When we interfered it was freely prophesied that we intended to keep Cuba and administer it for our own interests. The result has demonstrated in singularly conclusive fashion the falsity of these prophesies. Cuba is now an independent Republic. We governed it in its own interests for a few years, till it was able to stand alone, and then started it upon its career of self-government and independence, granting it all necessary aid. We have received from Cuba a grant of two naval stations, so situated that they in no possible way menace the liberty of the island, and yet serve as important defenses for the Cuban people, as well as for our own people, against possible foreign attack. The people of Cuba have been immeasurably benefited by our interference in their behalf, and our own gain has been great. So will it be with Panama. The people of the Isthmus, and as I firmly believe of the adjacent parts of Central and South America, will be greatly benefited by the

building of the canal and the guarantee of peace and order along its line; and hand in hand with the benefit to them will go the benefit to us and to mankind. By our prompt and decisive action, not only have our interests and those of the world at large been conserved, but we have forestalled complications which were likely to be fruitful in loss to ourselves, and in bloodshed and suffering to the people of the Isthmus.

"Instead of using our forces, as we were invited by Colombia to do, for the twofold purpose of defeating our own rights and interests and the interests of the civilized world, and of compelling the submission of the people of the Isthmus to those whom they regarded as oppressors, we shall, as in duty bound, keep the transit open and prevent its invasion. Meanwhile, the only question now before us is that of the ratification of the treaty. For it is to be remembered that a failure to ratify the treaty will not undo what has been done, will not restore Panama to Colombia, and will not alter our obligation to keep the transit open across the Isthmus and to prevent any outside power from menacing this transit.

"It seems to have been assumed in certain quarters that the proposition that the obligations of article 35 of the treaty of 1846 are to be considered as adhering to and following the sovereignty of the Isthmus, so long as that sovereignty is not absorbed by the United States, rests upon some novel theory. No assumption could be further from the fact. It is by no means true that a state in declaring its independence rids itself of all the treaty obligations entered into by the parent government. It is a mere coincidence that this question was once raised in a case involving the obligations of Colombia as an independent state under a treaty which Spain had made with the United States many years before Spanish-American independence. In that case Mr. John Quincy Adams, Secretary of State, in an instruction to Mr. Anderson, our minister to Colombia, of May 27, 1823, said:

"By a treaty between the United States and Spain concluded at a time when Colombia was a part of the Spanish dominions . . . the principle that free ships make free goods was expressly recognized and established. It is asserted that by her declaration of independence Colombia has been entirely released from all the obligations by which, as a part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all the engagements of Spain with other nations, affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and in justice. The stipulation now referred to is of that character.

"The principle thus asserted by Mr. Adams was afterwards sustained by an international commission in respect to the precise stipulation to which he referred; and a similar position was taken by the United States with regard to the binding obligation upon the independent state of Texas of commercial stipulations embodied in prior treaties between the United States and Mexico when Texas formed

a part of the latter country. But in the present case it is unnecessary to go so far. Even if it be admitted that prior treaties of a political and commercial complexion generally do not bind a new state formed by separation, it is undeniable that stipulations having a local application to the territory embraced in the new state continue in force and are binding upon the new sovereign. Thus it is on all hands conceded that treaties relating to boundaries and to rights of navigation continue in force without regard to changes in government or in sovereignty. This principle obviously applies to that part of the treaty of 1846 which relates to the Isthmus of Panama.

"In conclusion let me repeat that the question actually before this Government is not that of the recognition of Panama as an independent republic. That is already an accomplished fact. The question, and the only question, is whether or not we shall build an Isthmian canal.

"I transmit herewith copies of the latest notes from the minister of the Republic of Panama to this Government, and of certain notes which have passed between the special envoy of the Republic of Colombia and this Government.

President Roosevelt, special message to Congress, Jan. 4, 1904, For. Rel. 1903 260-278.

For the constitution of the Republic of Panama, see For. Rel. 1904, 562.

"The Government and people of Colombia consider themselves aggrieved by that of the United States in that they are convinced that the course followed by its administration, in relation to the events that have developed and recently been accomplished at Panama, have worked deep injury to their interests.

"If the matter were one of little importance, even though right were wholly on its side, my Government would not hesitate in yielding some of its advantages out of regard for the friendly relations which have happily existed without interruption between the two countries. But as the facts that have taken place affect not only valuable and valued interests, but also the independence and sovereignty of Colombia, my Government deems it its duty to remind that of the United States of the stipulation contained in section 5 of article 35 of the treaty of 1846, in force between the two countries, which reads word for word as follows:

"If, unfortunately, any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other in complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.

"On formulating the statement of 'injuries and damages,' referred to in the quoted abstract, there is nothing as natural or just as to recall to mind that in the treaty concluded on the 22d of January of this year between your excellency and the chargé d'affaires of Colombia, Señor Doctor Tomás Herran, there appears the following stipulation:

"The convention when signed by the contracting parties shall be ratified in conformity with the laws of the respective countries, etc.

"This condition, which rests at once on a correct conception of the doctrine accepted in such matters by nearly all the constitutional countries in the world, could not be foregone by Mr. Herran, since under our constitution and laws it is for the Congress to approve or disapprove the treaties signed by the Government, so that the said treaties are not valid unless the requirement has been observed, and as it likewise happens that under the law of nations covenants entered into with any authority that may not be competent are null, it is evident that no Colombian representative in the absence of a preexisting law conferring such authority could have signed the said convention without the above-quoted reservation. Furthermore, this formality was at the outset admitted by the American Government in the course of the negotiations that preceded the Hay-Herran convention, as shown in articles 25, 26, and 28 of the 'Draft of convention' submitted by the American Administration and dated November 28, 1902. Article 25 says, textually, that the convention will be exchanged 'after approval by the legislative bodies of both countries.'

"The Hay-Herran convention did not take in Washington a course different from that it took at Bogotá. The parliamentary debate that took place in the Senate was so full and earnest that it was not approved until the following extraordinary sessions. And if it had been rejected the disapproval would have involved no grievance for Colombia, for if the mere entering upon negotiations for a convention implied the obligatory approval of the legislative body it would be superfluous to submit it to its decision. Among the precedents of international usage that could be mentioned in this respect there may be cited the case that occurred between the same United States of America and Her Britannic Majesty, when, after the signing of the treaty intended to abrogate the convention known as the Clayton-Bulwer treaty, England, as I understand it, declined to accept the amendment introduced by the Senate, and her refusal delayed for some time the approval and ratification of the treaty.

"It follows that the Congress of Colombia, which is vested, according to our laws, with the faculty or power to approve or disapprove the treaties concluded by the Government, exercised a perfect right when it disapproved the Hay-Herran convention. This course did

not disqualify the Government for the conclusion of another treaty with the Government of your excellency; and it indeed resolved to make a proposition to that effect, and Mr. Herran, whom our minister for foreign affairs intrusted with that duty by cable, had the honor of bringing this purpose to your excellency's knowledge. Neither did that course imply any slight toward the Government of the United States, and, on the contrary, the Senate, observant of the existing friendly relations, relied on the sentiments of American fraternity, by which it is animated, for the introduction in the new agreement that was to be made of stipulations more consonant with the notion of sovereignty entertained by the people of Colombia.

"It is proper to observe that under our constitution the Congress is the principal guardian, defender, and interpreter of our laws. And it can not be denied by any one, I take it, that the Hay-Herran convention provides for the execution of public works on a vast scale and for the occupancy in perpetuity of a portion of the territory of Colombia, the occupant being not a juridical person whose acts were to be governed by the civil law and the Colombian code, but rather a sovereign political entity, all of which would have given occasion for frequent conflicts, since there would have been a coexistence in Panama of two public powers, the one national, the other foreign.

"Hence the earnest efforts evinced by the Senate in ascertaining whether the American Government would agree to accept certain amendments tending especially to avoid as far as practicable any restriction in the treaty of the jurisdiction of the nation within its own territory. There is abundant evidence of the efforts of the Senate in that direction, and I firmly believe that it would have approved the convention with amendments that would probably have been acceptable to the United States had not the American minister at Bogotá repeatedly declared in the most positive manner that his Government would reject any amendment that might be offered.

"In a note dated April 24 last he made the following statement to the minister of foreign relations:

"With reference to the interview I had with your excellency at which were discussed the negotiations for the annulment of the present concessions of the Panama Canal and railroad companies and other matters I have the honor to inform your excellency that I have received instructions from my Government in that respect.

"I am directed to inform your excellency, if the point should be raised, that everything relative to this matter is included in the convention recently signed between Colombia and the United States on the 22d of January last, and that, furthermore, any modification would be violative of the Spooner Act, and therefore inadmissible.

"The memorandum handed by the same minister to the minister of foreign relations on the 13th of June of this year reads as follows:

"I have received instructions from my Government by cable in the sense that the Government of Colombia to all appearances does not appreciate the gravity of the situation. The Panama Canal negotiations were initiated by Colombia and were earnestly solicited of my Government for several years. The propositions presented by Colombia with slight alterations were finally accepted by us. By virtue of this agreement our Congress reconsidered its previous decision and decided in favor of the Panama route. If Colombia now rejects the treaty or unduly delays its ratification the friendly relations between the two countries would be so seriously compromised that our Congress might next winter take steps that every friend of Colombia would regret with sorrow.

"In his note of the 5th of August of this year he says this, among other things:

"It seems to me that the commission (referring to the Senate commission) has not been sufficiently informed of the contents of my notes of April 24 and June 10, [sic] 1903, or that it has not given them the importance they merit, as being the final expression of the opinion or intentions of my Government. They clearly show that the amendment the commission proposes to introduce in article 1 is, by itself, equivalent to an absolute rejection of the treaty. I deem it my duty to repeat the opinion I already expressed to your excellency that my Government will not consider or discuss such an amendment in any way. There is another important amendment that the commission believes should be introduced in article 3, consisting in the suppression of the tribunals therein dealt with. I consider it my duty again to state my opinion that this will also in no wise be accepted by my Government.

"And further, in the same note, he adds:

"I avail myself of this opportunity respectfully to repeat that which I already stated to your excellency, that if Colombia truly desires to maintain the friendly relations that at present exist between two countries, and at the same time secure for herself the extraordinary advantages that are to be produced for her by the construction of the canal in her territory, in case of its being backed by so intimate an alliance of national interests as that which would supervene with the United States, the present treaty will have to be ratified exactly in its present form without amendment whatsoever. I say this because I am profoundly convinced that my Government will not in any case accept amendments.

"The Congress being unable to accept in its actual wording at least one of the stipulations contained in the treaty, because inhibited from doing so by the constitution, no one will wonder that under the pressure of threats so serious and irritating and in presence of a formal notification from the party which had authority to serve it that no amendment would be accepted, preference was given to disapproval.

"The integrity of any nation [said Mr. William H. Seward] is lost, and its fate becomes doubtful, whenever strange hands, and instruments unknown to the constitution, are employed to perform the proper functions of the people, established by the organic law of the state.<sup>a</sup>

"Before dismissing this point, it is proper to observe, in accordance with article 4 of the Spooner Act:

"Sec. 4. That should the President be unable to obtain for the United States a satisfactory title to the property of the New Panama Canal Company and the control of the neces-

<sup>a</sup> See p. 109, F. R., 1861, Mr. Seward to Mr. Adams.—Translator.



sary territory of the Republic of Colombia and the rights mentioned in sections 1 and 2 of this act, within a reasonable time and upon reasonable terms, then the President, having first obtained for the United States perpetual control by treaty of the necessary territory from Costa Rica and Nicaragua, upon terms which he may consider reasonable, for the construction, perpetual maintenance, operation, and protection of a canal connecting the Caribbean Sea with the Pacific Ocean by what is commonly known as the Nicaragua route, shall, through the said Isthmian Canal Commission, cause to be excavated and constructed a ship canal and waterway from a point on the shore of the Caribbean Sea, near Greytown, by way of Lake Nicaragua, to a point near Brito, on the Pacific Ocean.

"This act, on account of its having served as the basis of the treaty draft on the part of the United States, as stated in the preamble, which adds that it is accompanied by a copy of the act, had for Colombia exceptional importance. For it is so imperative that it seems to leave no faculty other than that of selecting one of the two routes, Panama or Nicaragua, and therefore it was to be presumed that the action of the American Government could not overstep the limits therein fixed. Whence it follows that the sole evil that could befall Colombia if her Congress should disapprove the treaty was that the route eventually selected would be that of Nicaragua. It may be that we fell into error when we entertained that belief, but it was sincere, and we were led into it by the profound respect with which the American laws inspire us.

"All governments being, as is well known, bound to respect the rights born of the independence and sovereignty of nations, the premature recognition by the United States of the province of Panama, rising in arms to detach itself from the country of which it is a part, while it is a matter of public knowledge that the mother country commands sufficient forces to subdue it, constitutes, according to the most ancient and modern authorities on international law, not only a grave offense to Colombia, but also a formal attack upon her wealth.

"For, as the territory forms the most important part of the national wealth, its dismemberment impairs the revenues applied to the discharge of corporate obligations, among which are foreign debts and those enterprises entailed on the insurgent province, from which Colombia derives a considerable income.

"If there be an end and eternal and immutable principles in right, that right of Colombia has been injured by the United States by an incredible transgression of the limits set by equity and justice.

"Before the *coup de main* which proclaimed the independence of the Isthmus took place at Panama, there were in this very city agents of the authors of that *coup* in conference with high personages clothed with official character, as is asserted by reputable American newspapers. I have received information to the effect that a bank in New York opened a considerable credit in their favor, with a knowledge of the general use for which it was intended, even though unaware

that it was to be applied in part to the bribery of a large part of the garrison at Panama.

“ Intercourse of any kind [said Mr. Seward] with the so-called ‘commissioners’ is liable to be construed as a recognition of the authority which appointed them. Such intercourse would be none the less hurtful to us for being called unofficial, and it might be even more injurious, because we should have no means of knowing what points might be resolved by it. Moreover, unofficial intercourse is useless and meaningless if it is not expected to ripen into official intercourse and direct recognition.<sup>a</sup>

“ It will be well to say that before the news was divulged that a revolution was about to break out on the Isthmus, American cruisers which reached their destination precisely on the eve of the movement were plowing the waters of the Atlantic and Pacific oceans. Cablegrams that are given public circulation in an official document show that two days before the movement the Secretary of the Navy issued orders to those cruisers not to permit the landing of troops of the Government of Colombia on Panama’s territory.

“ A military officer of the Government of the United States stopped the railway from carrying to Panama, as it was under obligations to do, a battalion that had just arrived at Colon from Bogotá at the very time when its arrival in that city would have impeded or suppressed any revolutionary attempt. A few days thereafter, when my Government intrusted me with the duty of leading the army that was to embark at Puerto Colombia to go and restore order on the Isthmus, being unacquainted except in an imperfect manner with the attitude assumed by the American war ships, I had the honor to address a note on the subject to Vice-Admiral Coghlan, and in his reply, which was not delayed, he tells me that—

“ his present orders are to prevent the landing of soldiers with hostile intent within the boundary of the State of Panama.

“ The Republic of Colombia, with a population of 5,000,000 souls, is divided into nine departments, of which Panama is one of the least populous, as the number of its inhabitants does not exceed 250,000, while there are others in each of which they number over 900,000. The Colombian army at the time consisted of 10,000 men, a force more than sufficient to suppress the Panaman revolution if Your Excellency’s Government had not prevented the landing of the troops under my command that were to embark at Puerto Colombia under Generals Ospina, Holguín, and Calballero, who soon thereafter accompanied me to that city, and at Buenaventura, on the Pacific, under Generals Velazco, Dominguez, and others. It is known that there is no overland way to reach Panama with troops from the interior of Colombia.

“ The gravity of the facts contained in this recital increases as they draw closer to the end.

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<sup>a</sup> Mr. Seward to Mr. Adams, No. 10, May 21, 1861.—Translator.

"In the midst of profound peace between the two countries, the United States prevented by force the landing of troops where they were necessary to reestablish order, in a few hours, in the insurgent province. Because of this circumstance, and as a *coup de main*, certain citizens of Panama, without taking into account the consent of the other towns of the department, proclaimed the independence of the Isthmus and organized a government. Two days after effecting that movement they were recognized by the American Government as a sovereign and independent republic, and fourteen days later the American Government signed a treaty with the Republic of Panama which not only recognized and guaranteed its independence, but agreed to open a canal for the purpose of uniting the waters of the Atlantic with those of the Pacific.

"It is well known that the contract which Colombia made with the French company, in the exercise of its perfect right, for the construction of this canal, is in force and will remain in full force and vigor, legally at least, so long as Colombia does not give her consent for its transfer to a foreign government; since in the aforesaid contract it is expressly stipulated that a transfer to any foreign government, or any attempt whatever to make a transfer, would be cause for absolute nullification.

"The same is true with regard to the Panama Railroad Company; so that, without the express consent of Colombia, no transfer can have legal effect, because it can not cancel the legal bonds which exist between the Republic of Colombia and those companies—bonds growing out of perfect contracts, which, according to the precepts of universal jurisprudence, can not be disregarded because one of the parties may consider that the strip of land in which the enterprise radicated has been conquered by a foreign country. The lapse of many years is necessary in order that the facts may establish the right, and even without the need of such time elapsing the Colombians feel sure that the justice and equity which control the acts of Your Excellency's Government in its relations with all nations are a sure pledge that our complaints and claims will be heeded.

"Nor is it just to expect anything else in view of the constant practice which the United States has established in similar cases. Among many others, are set forth in its diplomatic annals the antecedent history relative to the independence of South American States, proclaimed in 1810; that of the new state of Hungary, in the middle of the last century; and that of Ireland, later, in 1866; not to make mention of the practice systematically observed by the powers, of which their procedure when the Netherlands proclaimed independence in the time of the Philips of Spain is an example. In this relation the precedent of Texas, when the United States Senate disap-

proved the treaty signed by the Washington Cabinet with the secessionists of that Mexican province, has an especial significance.

"In the note of Mr. Seward, Secretary of State, to Mr. Adams, United States minister, in 1861, this doctrine is found:

"We freely admit that a nation may, and even ought, to recognize a new state which has absolutely and beyond question effected its independence, and permanently established its sovereignty; and that a recognition in such a case affords no just cause of offense to the government of the country from which the new state has so detached itself. On the other hand, we insist that a nation that recognizes a revolutionary state, with a view to aid its effecting its sovereignty and independence, commits a great wrong against the nation whose integrity is thus invaded, and makes itself responsible for a just and ample redress. (*Foreign Relations*, 1861, pp. 76-77.)

"At another point, in the same note, the Secretary says to the minister:

"To recognize the independence of a new state, and so favor, possibly determine, its admission into the family of nations, is the highest possible exercise of sovereign power, because it affects in any case the welfare of two nations, and often the peace of the world. In the European system this power is now seldom attempted to be exercised without invoking a consultation or congress of nations. That system has not been extended to this continent. But there is even a greater necessity for prudence in such cases in regard to American states than in regard to the nations of Europe. (*Foreign Relations*, 1861, p. 79, Mr. Seward to Mr. Adams, No. 2, April 10, 1861.)

"Referring to the consideration which nations should mutually observe, he adds:

"Seen in the light of this principle, the several nations of the earth constitute one great federal republic. When one of them casts its suffrages for the admission of a new member into that republic, it ought to act under a profound sense of moral obligation, and be governed by considerations as pure, disinterested, and elevated as the general interest of society and the advancement of human nature. (*Foreign Relations*, 1861, p. 79, Mr. Seward to Mr. Adams, No. 2, April 10, 1861.)

"It would seem that nothing could be added to the benevolence of these noble and humanitarian doctrines, written by the great man, who, unhappily for his country and for Colombia, is not living to-day.

"If the sovereignty of a nation gives to it especially the power to govern itself; if the right to look after its own interests is an attribute of sovereignty; if, upon such right, rests the stability and security of international relations, respect for such sovereignty should be the more heeded by one who is obligated, as is the United States, not only by international precepts, but also by an existing public treaty from which it has derived indisputable advantages. The pertinent part of the thirty-fifth article of the treaty in force between the United States and Colombia reads as follows:

"And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages and for the favors they have acquired by the fourth, fifth, and sixth articles of this treaty, the United States guarantees, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit

from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

"It may be said that the power of the United States is for the time being limitless, not only by reason of its laws and its resources of every kind, but also on account of the respect with which its greatness inspires the world. But in order to deal justly with a weak country this circumstance should be taken into account—that, in stipulating to guarantee 'the perfect neutrality and property of the Isthmus' it could not be supposed that the words 'neutrality' and 'property' could be given any other interpretation than the technical one they have. If, by a *coup de main*, the revolutionists have snatched from Colombia the property of the Isthmus, it seems natural that the United States, in view of the aforesaid stipulation, should return the property to its legitimate owner. It does not seem right to give the word 'neutrality' the interpretation that, by its application, the acts of the revolutionists shall be left free, because, among other reasons, the stipulation contained in the thirty-fifth article above quoted excepts no case; nor did it foresee, as it could not have foreseen, that the United States would prevent Colombia from landing her forces in Panama territory in case of secession.

"If Colombia had not sufficient force to compel Panama to remain a part of the national unit, it would, without doubt, have asked the mediation of some friendly country in order to reach an understanding with the *de facto* government which has been established there.

"But for it to have been able to subdue it by force it was necessary that Your Excellency's Government should remain neutral in the dispute; in not having done so, your Government itself violated 'the rights of sovereignty and the property which Colombia has and possesses over the said territory,' not complying, consequently, with the obligation it contracted to guarantee those rights as set forth in the above-cited part of the thirty-fifth article of the treaty. And it may be observed that the United States continues deriving the advantages granted under the treaty, while we lose those which we gave in order to obtain such guaranties.

"The true character of the new state of Panama is revealed in the fact that it came into existence by a *coup de main*, effected by the winning over of troops, valorous without doubt, but who have fought against no one, assaulted no intrenchment, captured no fort—contenting themselves with putting in prison the constituted authorities.

"If conserving our national integrity, with a few years of peace, we could recover the powers we have lost through unfortunate civil wars, and could hope, by reason of the moral and physical capacity of our

race, to take a distinguished position in the American Continent; but if the Government of the United States, by preventing the military action of Colombia to subject the rebels to loyal obedience, should, in a way, make itself the ally of the Panama revolutionists, that Government will be responsible for any new secession movement that may occur, and also, before history at least, for any anarchy, license, and dissolution which a further dismemberment might occasion. Sad indeed is the fate of my country, condemned at times to suffer calamities from its own revolutions and at others to witness the unexpected attacks of a powerful but friendly state, which for the first time breaks its honored traditions of respect for right—especially the right of the weak—to deliver us pitilessly to the unhappy hazards of fortune.

“There shall be a perfect, firm, and inviolable peace [says the first article of the aforesaid treaty] and sincere friendship between the United States of America and the Republic of New Granada (now Colombia) in all the extent of their possessions and territories, and between their citizens, respectively, without distinction of persons or places.

“If the United States repels by force the action of our armies in Panama, is not this a clear violation of this article, since peace in one of the Colombian territorial possessions is broken?

“The Panama revolutionists, counseled by speculators from several countries, who had assumed the direction of affairs, did not consult the opinion of the inhabitants of their own territory, for there are good reasons for the belief that there are in that territory thousands of persons who, respecting order and authority, have condemned the separatist movement with a determined will and in most energetic and severe terms.

“Colombia, in its internal law, has never recognized the principle of secession, because, among other reasons, the obligations contracted with foreign nations by treaty, or with private parties by contract, rest upon the mass of the assets which the State possessed at the moment when the common authority contracted such obligations.

“If the people of Panama, animated by the noble sentiments which induced men of action to seek quicker and more rapid progress, had proclaimed their independence and, without foreign aid, been victorious in battle waged against the armies of the mother country, had organized a government, drawn up laws, and proved to the world that it could govern itself by itself and be responsible to other nations for its conduct, without doubt it would have become entitled to recognition by all the powers.

“But none of these things having occurred, and judging by the practice which in similar cases has guided the conduct of the American Government, the belief is warrantable that the recognition that

has been given would probably not have been made if there had not existed in Panama the best route for the isthmian canal.

"In the former case Colombia would have had no right to complain of the failure to fulfill the existing treaty, nor would it have shunned any legitimate means for seeking an arrangement that should dissolve the civil bonds which unite it with those enterprises radicated on Panama territory by contracts made in the exercise of a perfect right.

"But Panama has become independent, has organized a Government, has induced a few powers prematurely to recognize her sovereignty, has usurped rights which do not belong to her in any case, and has ignored the debts which weigh upon Colombia (debts contracted, many of them, to reestablish order which her sons have often disturbed), because the Government of the United States has desired it; because, with its incomparably superior force, the United States has prevented the landing of Colombian troops destined to reestablish order after our having exhausted every possible means of friendly understanding; because the United States, even before the separatist movement was known in Bogotá, had its powerful war vessels at the entrances of our ports, preventing the departure of our battalions; because, without regarding the precedents established by statesmen who have dealt with this matter, the United States has not respected our rights in that strip of land which Colombia considers as a divine bequest for the innocent use of the American family of states; and, finally, because the Government of the United States, invoking and putting into practice the right of might, has taken from us by bloodless conquest—but by conquest, nevertheless—the most important part of the national territory.

"Every nation is responsible to other nations for its conduct, whence it follows that all have among themselves rights and obligations, but these rights and obligations are limited by the right of property. The owner of an estate can not oppose the passage through his land—for example, of a railroad which the community needs—but he may demand that he be indemnified for the damage done him. In the same manner a state should certainly not obstruct the passage through its territory of a canal which the progress of the age and the needs of humanity have made necessary, but it has the right to impose conditions which shall save its sovereignty and to demand indemnification for the use thereof. Reasons based on the needs of humanity are undoubtedly very powerful, but they do not convincingly prove that the legitimate owner shall be deprived of a large part of his territory to satisfy such needs.

"It might be said to me that exaggerated demands or obstacles which are intentionally raised are equivalent to a refusal. But this is not our case. Colombia has made divers treaties and contracts

with foreign countries for the construction of a Panama Canal, and if they have not been carried into effect, as was the case with the treaty with the United States in 1870 and the contract with the French company later, it was not the fault of Colombia. Our demands have not been exaggerated, inasmuch as the terms of the treaty negotiated with the American representative were more advantageous than those stipulated with the French representative, and the conditions set forth in the Hay-Herran convention were much more disadvantageous than those made with the French company. The fact that the United States demands from us, in order to carry out the enterprise, a part of our sovereignty, which, under our laws, we can not legally concede so long as the constitution is not modified, because the powers that did it would be responsible before the judicial branch, does not mean that we have been opposed nor that we are opposed to the realization of the greatest undertaking of the kind which the past and future centuries have seen or will see.

“Civil wars are a calamity from which no nation has ever been able to free itself. This being true, to hold responsible the Government which suffers revolutions because it can not prevent them or because it hastens to remedy them when danger menaces seems a notorious injustice, because, if the principle of foreign intervention in civil conflicts were accepted, there would be few cases that would not be converted in the end into international wars. To refrain from dealing or treating with a state for fear of civil wars might be deemed equivalent to refraining from ‘constructing ships for fear of shipwrecks or building houses for fear of fire.’ Nor is it understood what power there would be that would assume the unhappy task of imposing peace upon the rest, nor under what conditions it would do so, since to take away portions of their territory would be a punishment greater than the fault.

“In this crisis of the life of my country, as unlooked for as it is terrible, Colombia rests its most comforting hopes in the sentiments of justice which animate the Government of your excellency, and confidently trusts that that Government, which has so many times surprised the world by its wisdom, will, on this occasion, astonish it by its example.

“In any event, Colombia complies with the duty imposed upon her by the treaty of 1846 in that part of the 35th article which says:

“ . . . neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.



"Since the aforesaid treaty is the law which governs between the two countries, and now that the weakness and ruin of my country, after three years of civil war scarcely at an end, and in which her bravest sons were lost by thousands, place her in the unhappy position of asking justice of the Government of your excellency, I propose that the claims which I make in the present note on account of the violation of the aforesaid treaty, and all other claims which may hereafter be made in connection with the events of Panama, be submitted to the Arbitration Tribunal of The Hague."

General Reyes, special minister of Colombia, to Mr. Hay, Sec. of State, Dec. 23, 1903,  
'For. Rel. 1903, 284-294.

**Mr. Hay's note of Jan. 5, 1904.** "The Government of the United States has carefully considered the grave complaints so ably set forth in the 'statement of grievances' presented on behalf of the Government and people of Colombia, with your note of the 23d ultimo.

"The Government and people of the United States have ever entertained toward the Government and people of Colombia the most friendly sentiments, and it is their earnest wish and hope that the bonds of amity that unite the two peoples may forever remain unbroken. In this spirit the Government of the United States, mindful that between even the most friendly nations differences sometimes unhappily arise, has given to your representations the most deliberate and earnest attention, and in the same spirit it will employ every effort consistent with justice and with its duty to itself and to other nations not only to maintain but also to strengthen the good relations between the two countries.

"At the present moment the questions which you submit can be viewed only in the light of accomplished facts. The Republic of Panama has become a member of the family of nations. Its independence has been recognized by the Governments of the United States, France, China, Austria-Hungary, Germany, Denmark, Russia, Sweden and Norway, Belgium, Nicaragua, Peru, Cuba, Great Britain, Italy, Japan, Costa Rica, and Switzerland. These solemn acts of recognition carry with them international obligations which, in peace as in war, are fixed by the law of nations and which can not be disregarded. A due appreciation of this circumstance is shown in your admission, made with a frankness and fairness honorable alike to your Government and to yourself, that 'Panama has become independent—has organized a government.'

"The action not merely, as you observe, of a 'few powers,' but of all the so-called 'great powers' and many of the lesser ones, in recognizing the independence of Panama, leaves no doubt as to the public opinion of the world concerning the propriety of that measure. The law of nations does not undertake to fix the precise time at

which recognition shall or may be extended to a new state. This is a question to be determined by each state upon its own just sense of international rights and obligations; and it has rarely happened, where a new state has been formed and recognized within the limits of an existing state, that the parent state has not complained that the recognition was premature. And if in the present instance the powers of the world gave their recognition with unwonted promptitude, it is only because they entertained the common conviction that interests of vast importance to the whole civilized world were at stake, which would by any other course be put in peril.

"The independence of the Republic of Panama being an admitted fact, the Department will proceed to consider the complaints presented by you on behalf of your Government as to the manner in which that independence was established. In performing this task I desire to avoid all appearance of recrimination; and if I shall not be wholly successful in so doing, it is only because I am under the necessity of vindicating the conduct of this Government against reproaches of the most grave and unusual character. The Department is in duty bound to deal with these charges in a spirit of the utmost candor; but in performing this duty it will not seek in unofficial sources material for unjust and groundless aspersions. It is greatly to be regretted that your duty to your Government could not, in your estimation, have been discharged within similar limitations.

"With every disposition to advance the purpose of your mission, the Department has read with surprise your repetition of gross imputations upon the conduct and motives of this Government, which are said to have appeared in 'reputable American newspapers.' The press in this country is entirely free, and as a necessary consequence represents substantially every phase of human activity, interest, and disposition. Not only is the course of the Government in all matters subject to daily comment, but the motives of public men are as freely discussed as their acts; and if, as sometimes happens, criticism proceeds to the point of calumny, the evil is left to work its own cure. Diplomatic representatives, however, are not supposed to seek in such sources material for arguments, much less for grave accusations. Any charge that this Government or any responsible member of it held intercourse, whether official or unofficial, with agents of revolution in Colombia is utterly without justification.

"Equally so is the insinuation that any action of this Government prior to the revolution in Panama was the result of complicity with the plans of the revolutionists. The Department sees fit to make these denials, and it makes them finally.

"The origin of the Republic of Panama and the reasons for its independent existence may be traced in certain acts of the Government of Colombia, which are matters of official record.

"It is a matter of common knowledge that the quest of a way to the westward, across the sea, from Europe to Asia led to the discovery and settlement of the American continents. The process of colonization had, however, scarcely begun when the adventurous spirits of that age, not to be balked in their undertaking by an obstacle that seemed to be removable, began to form projects for a canal to connect the Atlantic and Pacific oceans. As early as 1528 a proposal was laid before the Emperor Charles V. for the opening of such a way across the Isthmus of Panama. From that day to the present the project has continued to occupy a place among the great enterprises yet to be accomplished. It remains unfulfilled only because the experience of four hundred years has demonstrated that private effort is wholly inadequate to the purpose, and that the work must be performed, if at all, under the auspices of a government of the largest resources. There was only one such government in a position to undertake it. By a well-settled policy, in which all American nations are understood to concur, the assumption of the task by any of the great governments of Europe was pronounced to be inadmissible. Among American governments there was only one that seemed to be able to assume the burden, and that was the Government of the United States.

"Such was the precise situation when the United States manifested its determination to construct the great highway across the American isthmus. Its purpose was universally applauded. The circumstance that this Government possibly might, in return for the great expenditures which it was about to hazard, derive from the construction of the canal some special advantage was not thought to be a reason for opposing what was to be of such vast benefit to all mankind. The Clayton-Bulwer treaty was conceived to form an obstacle, and the British Government therefore agreed to abrogate it, the United States only promising in return to protect the canal and keep it open on equal terms to all nations, in accordance with our traditional policy. Nor were indications wanting of appreciation on the part of the American Republics. On January 22, 1902, the second Pan-American conference, sitting at the City of Mexico, adopted the following resolution:

"The Republics assembled at the International Conference of Mexico applaud the purpose of the United States Government to construct an interoceanic canal, and acknowledge that this work will not only be worthy of the greatness of the American people, but also in the highest sense a work of civilization and to the greatest degree beneficial to the development of commerce between the American States and the other countries of the world.

"Among the delegates who signed this resolution, which was adopted without dissent, was the delegate of Colombia.

"At that time the Government of the United States had not formally decided upon the route for the canal, whether by way of Panama or of Nicaragua. Owing to the lack of correct information there had long existed a strong tendency toward the latter route, but, as the result of more thorough investigations, a decided change in opinion had begun to appear. To Colombia this change was understood to be very gratifying. As early as May 15, 1897, the Colombian chargé d'affaires at Washington, speaking in the name of his Government, represented in a 'friendly spirit' that any official assistance extended by the United States to the Nicaraguan Canal Company would work serious injury to Colombia.

"In a similar sense Señor Martinez Silva, then Colombian minister at this capital, in a note of December 7, 1901, referring to a press report that the Isthmian Canal Commission had, by reason of the excessive price fixed by the Panama Canal Company, reported in favor of the Nicaraguan route, assured the Department that the price was not final, and after declaring that the matter was one that affected 'the interests of the Colombian Government, which is well disposed to facilitate the construction of the proposed interoceanic canal through its territory,' said:

"It would indeed be unfortunate if, through misunderstandings arising from the absence of timely explanations, the Government of the United States should be forced to select a route for the proposed canal which would be longer, more expensive, both in construction and maintenance, and less adapted to the commerce of the world than the short and half-finished canal available at Panama.

"On June 28, 1902, the President of the United States gave his approval to the act now commonly referred to as the Spooner Act, to provide for the construction of the interoceanic canal. Following the report of the Isthmian Canal Commission, which confirmed the opinion expressed by the Colombian Government, it embodied the formal decision of the United States in favor of the Panama route. It accordingly authorized the President to acquire, at a cost not exceeding \$40,000,000, 'the rights, privileges, franchises, concessions,' and other property of the New Panama Canal Company, including its interests in the Panama Railroad Company, and to obtain from Colombia on such terms as he might deem reasonable, perpetual control for the purposes of the canal of a strip of land not less than six miles wide, such control to include jurisdiction to make and, through such tribunals as might be agreed on, to enforce such police and sanitary rules and regulations as should be necessary to the preservation of order and of the public health.

"The act also provided, in a clause to which your statement adverts, that, in case the President should 'be unable to obtain for the United States a satisfactory title to the property of the New

Panama Canal Company and the control of the necessary territory of the Republic of Colombia,' together with the 'rights' mentioned in connection therewith, 'within a reasonable time and upon reasonable terms,' he should turn to Nicaragua. But this provision, while it indicated that the construction of the canal was not wholly to depend upon the success or failure to make reasonable terms with Colombia and the canal company, by no means implied that the question of routes was a matter of indifference.

"In the nature of things it could not be so. Not only was the work to endure for all time, but its prompt construction was felt to be of vast importance; and it could not be a matter of less concern to the United States than to Colombia that this Government might possibly be forced to adopt a route which would, as the Colombian minister had observed—

"be longer, more expensive, both in construction and maintenance, and less adapted to the commerce of the world than the short and half-finished canal available at Panama.

"Nevertheless, even if the route by Panama had been found to be the only feasible one, it would have been highly imprudent for this Government to expose itself to exorbitant demands.

"It possessed, indeed, the gratifying assurance that the Colombian Government was 'well disposed to facilitate the construction of the proposed interoceanic canal through its territory,' and the Department is pleased to add to this your present assurance that Colombia considers the canal strip 'as a Divine bequest for the innocent use of the American family;' but it was fully understood that, before the canal was begun, arrangements of a very substantial kind would have to be made; and it was felt that, no matter how generous the views of the Colombian Government might be, the canal company might be indisposed to act in the same liberal spirit.

"The Spooner Act, in providing for the acquisition by the United States of a limited control over the canal strip, merely followed the lines of previous negotiations with Nicaragua and Costa Rica. Under any circumstances, the exercise of such control could not have been considered unreasonable, but it was deemed to be altogether essential, in view of the unsettled political and social conditions which had for many years prevailed, and which unhappily still continued to exist, along the canal routes, both in Nicaragua and in Panama. Its necessity was clearly recognized in the Hay-Pauncefote treaty, and it was on all sides fully understood to form a requisite part of any plan for the construction of the canal by the United States. Neither while the Spooner Act was pending before Congress nor at any previous time was it intimated from any quarter that it would form a bar to the carrying out of the great project for which the local sovereigns of the canal routes were then such ardent competitors.

"After the Spooner Act was approved, negotiations were duly initiated by Colombia. They resulted on January 22, 1903, in the conclusion of the Hay-Herran convention. By this convention every reasonable desire of the Colombian Government was believed to be gratified. Although the concession to the United States of the right to construct, operate, and protect the canal was understood to be in its nature perpetual, yet, in order that no technical objection might be raised, it was limited to a term of one hundred years, renewable at the option of this Government for periods of a similar duration. The limited control desired by the United States of the canal strip for purposes of sanitation and police, not only in its own interest but also in that of Colombia and all other governments, was duly acquired. But in order that neither this, nor any other right or privilege, granted to the United States, might give rise to misconception as to the purposes of this Government, there was inserted in the convention this explicit declaration:

"The United States freely acknowledges and recognizes this sovereignty [of Colombia] and disavows any intention to impair it in any way whatever or to increase its territory at the expense of Colombia or of any of the sister republics in Central or South America; but, on the contrary, it desires to strengthen the power of the republics on this continent, and to promote, develop, and maintain their prosperity and independence.

"This declaration was, besides, confirmed by the reaffirmation of article 35 of the treaty of 1846, as well as by the stipulations made with reference to the protection of the canal; for it was expressly provided that only in exceptional circumstances, on account of unforeseen or imminent danger to the canal, railways, or other works, or to the lives and property of the persons employed upon them, should the United States employ its armed forces without obtaining the previous consent of the Government of Colombia, and that as soon as sufficient Colombian forces should arrive for the purpose those of the United States should retire.

"Moreover, in view of the great and to some extent necessarily unforeseen expenses and responsibilities to be incurred by the United States, the pecuniary compensation agreed to be made to Colombia was exceedingly liberal. Upon the exchange of the ratifications of the convention, \$10,000,000 in gold were to be paid, a sum equivalent to two-thirds of what is reputed to be the total amount of the Colombian public debt; and, in addition to this, beginning nine years after the same date, an annual payment of \$250,000 in gold was to be made, a sum equivalent to the interest on \$15,000,000 at the rate at which loans can be obtained by this Government.

"Such was the convention. The Department will now consider the manner in which it was dealt with.

"In the 'statement of grievances,' to which I have now the honor to reply, a prominent place is given to the stipulation that the con-

vention when signed should be 'ratified according to the laws of the respective countries,' and it is said that the course taken in Washington was not different from that at Bogotá. In a narrow, technical sense this is true, but in a broader sense no supposition could be more misleading. The convention was submitted to the Senate of the United States on the day following its signature. From first to last it was cordially supported by the Administration, and on the 17th of March it was approved without amendment.

"The course taken at Bogotá affords a complete antithesis. The Department is not disposed to controvert the principle that treaties are not definitively binding till they are ratified; but it is also a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature, and that in such case the exchange of ratifications confirms the treaty from that date. This rule necessarily implies that the two Governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation, but also to do nothing in contravention of its terms.

"We have seen that by the Spooner Act, with reference to which the convention was negotiated, the President was authorized to acquire, at a cost not to exceed \$40,000,000, 'the rights, privileges, franchises, concessions,' and other property of the New Panama Canal Company. It was, of course, well known to both Governments that the company under the terms of the concession of 1878 could not transfer to the United States 'its rights, privileges, franchises, and concessions' without the consent of Colombia. Therefore the Government of the United States before entering upon any dealings with the New Panama Canal Company negotiated and concluded the convention with Colombia. The first article of this convention provides:

"The Government of Colombia authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties, and concessions, as well as the Panama Railroad and all the shares or part of the shares of that company.

"The authorization thus given, in clear and unequivocal terms, covers expressly the 'rights, privileges, . . . and concessions' of the company, as well as its other property.

"Some time after the convention was signed the Government of the United States learned, to its utter surprise, that the Government of Colombia was taking with the canal company the position that a further permission, in addition to that contained in the convention, was necessary to the transfer of its concessions and those of the Panama Railroad Company, respectively, to the United States, and that, as a preliminary to this permission, the companies must enter into agreements with Colombia for the cancellation of all her obligations

to either of them under the concession. This proceeding seemed all the more singular in the light of the negotiations between the two Governments. The terms in which the convention authorized the New Panama Canal Company to sell and transfer its 'rights, privileges, properties, and concessions' to the United States were the same as those embodied in the original draft of a treaty presented to this Government by the Colombian minister on March 31, 1902.

"No change in this particular was ever suggested by Colombia, in all the discussions that followed, until November 11, 1902. On that day the Colombian minister presented a memorandum in which it was proposed that the authorization should be so modified that 'the permission accorded by Colombia to the canal and the railroad companies to transfer their rights to the United States' should 'be regulated by a previous special arrangement entered into by Colombia.' To this proposal this Department answered that 'the United States considers this suggestion wholly inadmissible.' The proposition was then abandoned by Colombia, and the convention was nearly three months later signed without any modification of the absolute authorization to sell.

"The notices actually sent to the companies went, however, even further than the rejected and abandoned proposal presented by the Colombian minister, since they required the companies to cancel all obligations of Colombia to them, and thus to destroy the rights, privileges, and concessions which she had by the convention solemnly authorized the canal company to sell and transfer to the United States. The whole superstructure so laboriously reared was thus threatened with destruction by the removal of one of its foundation stones.

"It was against this act of the Colombian Government itself that the remonstrance made by the American minister, Mr. Beaupré, by instruction of his Government, on the 24th of April last, was presented. Great stress is laid upon this remonstrance in Colombia's 'statement of grievances,' as the first of a series of three diplomatic representations which, by assuming to deny to the Colombian Congress the exercise of its constitutional functions, affronted that body and led the Colombian Senate to reject the convention. Unfortunately for this supposition, the Colombian Congress was not in session. It had not then been convoked; nor did it meet until the 20th of June. The representation was made solely with a view to recall to the Colombian Government the terms of the agreement which it had itself concluded, but of which it seemed to have become oblivious. The second representation was made, as you state, on the 18th of June, two days before Congress met, but the cabled instruction under which it was made was sent by this Government on the 9th of June.



The third was made on the 5th of August, while the Congress was in session. Its obvious purpose was, if possible, to exhibit the situation in its true light.

"The Department would here gladly end its recital of the course of the Colombian Government with what has already been exhibited, but the circumstances do not permit it to do so. As the 'statement of grievances' presented on behalf of Colombia is founded upon the tacit assumption that her present plight is due solely to wrongs committed by this Government, it is necessary that the facts should be disclosed.

"The violation by the Colombian Government, long before the Congress assembled, of its agreement to the sale and transfer to the United States of the rights and concessions of the canal and railway companies was not the only act by which it manifested its purpose to repudiate its own engagements. For some time after the convention was signed, its terms appeared to be as satisfactory to the people of Colombia as they seemingly had been to the Colombian Government.

"This state of affairs continued until General Fernandez, in charge of the ministry of finance, issued more than a month before the Congress was convoked and more than two months before it met, a circular to the Bogotá press, which, as Mr. Beaupré reported, 'had suddenly sprung into existence,' inviting discussion of the convention. The circular in substance stated, according to Mr. Beaupré's report, that the Government 'had no preconceived wishes for or against the measure;' that it was 'for Congress to decide,' and that Congress would be largely guided by 'public opinion.' In view of what the Government had already done, it is not strange that this invitation to discussion was followed by violent attacks upon the convention, accompanied by the most extravagant speculations as to the gains which Colombia might possibly derive from its rejection. No thought whatever seems to have been taken of the incalculable benefits that would accrue to Colombia as the direct and necessary result of the construction of the canal. Only the immediate possibilities, which the resources of this Government and the situation of the canal company served to suggest, seem to have been taken into account.

"It is entirely impossible [said Mr. Beaupré, writing on May 4, 1903] to convince these people that the Nicaragua route was ever seriously considered by the United States; that the negotiations concerning it had any other motive than the squeezing of an advantageous bargain out of Colombia; nor that any other than the Panama route will be selected. . . . Therefore, it is contended, and generally believed, that there is no immediate necessity of confirming the Hay-Herran convention; that the negotiations can be safely prolonged, in the end securing very much better terms for Colombia. The public discussion is largely along the lines of the loss of national honor by the surrender of sovereignty; . . . private discussion, which perhaps more clearly reflects the real situation, is to the effect that the price is inadequate.

"That Mr. Beaupré's summary of the situation—a situation which seems logically to have followed from the Government's own measures—was correct is amply demonstrated in the sequel. The Department deems it unnecessary to enter into any argument upon the question raised at Bogotá as to Colombia's 'sovereignty.' The convention speaks for itself, and its provisions for the acknowledgment and assurance of Colombia's sovereignty have already been set forth. The explanations put forward in Colombia's 'statement of grievances' merely repeat the pleas devised at the Colombian capital. The sudden discovery that the terms of the convention, as proposed and signed by the Colombian Government, involved a violation of the Colombian constitution, because it required a cession to the United States of the 'sovereignty' which it expressly recognized and confirmed, could be received by this Government only with the utmost surprise. Nevertheless, the Colombian Senate unanimously rejected the convention.

"This fact was communicated to the Department by Doctor Heran on the 22d of August last, by means of a copy of a cablegram from his Government. In that telegram the 'impairment' of Colombian 'sovereignty' was mentioned as one of the 'reasons advanced in debate' for the Senate's action; but joined with it there was another reason, with which the Department had long been familiar, namely, the 'absence' of a 'previous agreement' of the companies with the Colombian Government for the transfer of their privileges. To these reasons there was added a reference to the representations made by Mr. Beaupré; but it was said to be 'probable' that the Colombian Congress would 'provide bases' for 'reopening negotiations.'

"No such action, however, was taken by the Colombian Congress. On the contrary, by a report of the majority of the Panama canal committee, read in the Colombian Senate on the 14th of October last, it was recommended that a bill which had been introduced to authorize the Government to enter upon new negotiations should be 'indefinitely postponed.' The reason for this recommendation is disclosed in the same report. By a treaty concluded April 4, 1893, the original concession granted to the Panama Canal Company was extended until December 31, 1904.

"By a legislative act in 1900 a new extension was made till October 31, 1910; but the report, adopting a suggestion which had been put forward in the press, raises a question as to whether this legislative extension was valid, and adds that if it was not valid the aspect of the question would be entirely changed in consequence of the fact that when a year later the Colombian Congress should meet in ordinary session the extension of 1893 would have 'expired and every privilege with it.' In that case, the report goes on to say, the Repub-

lic would become the 'possessor and owner, without any need of a previous judicial decision and without any indemnity, of the canal itself and of the adjuncts that belong to it,' and would not only be able to 'contract . . . without any impediments,' but would be in more clear, more definite, and more advantageous possession, both legally and materially.

"This programme, if not expressly, was at least tacitly adopted by the Colombian Congress, which adjourned on the 31st of October without providing any bases for the reopening of negotiations. It was a scheme to which this Government could not possibly have become a party. Of this fact the Colombian Government was duly notified when the first intimation of its purpose was, long anterior to the assembling of the Congress, first disclosed. The Colombian Government was expressly informed that such action on its part, or on that of the companies, would be inconsistent with the agreements already made between the United States and the canal company, with the act of June 28, 1902, under the authority of which the convention was made, and with the express terms of the convention itself. It was, under the circumstances, equivalent to a refusal of all negotiation with this Government.

"Under these circumstances it was the intention of the President before further action to submit the matter to Congress, which was then soon to assemble. The situation, however, was presently changed. If the Government at Bogotá, as the 'statement of grievances' assures us, 'fell into error' in supposing that the only consequence of its rejection of the convention would be the abandonment of the Panama route by this Government, its blindness to a situation at home that was attracting the attention of the world can only be imputed to itself. Reports of impending trouble, as the result of what was going on at Bogotá, were rife.

"Advices came to this Government, not only through the press but also through its own officials, of the existence of dangerous conditions on the Isthmus, as well as in the adjacent States whose interests were menaced. Disorders in that quarter were not new. In the summer of 1902, as well as in that of 1901, this Government had been obliged by its forces to maintain order on the transit route, and it took steps, as it had done on previous occasions, to perform a similar duty should the necessity arise. The form the trouble might take could not be foreseen, but it was important to guard against any destructive effects.

"The reasonableness of these precautions soon became evident. The people of Panama rose against an act of the Government at Bogotá that threatened their most vital interests with destruction and the interests of the whole world with grave injury. The movement assumed the form of a declaration of independence. The

avowed object of this momentous step was to secure the construction of the interoceanic canal. It was inspired by the desire of the people at once to safeguard their own interests and at the same time to assure the dedication of the Isthmus to the use for which Providence seemed to have designed it.

"The situation thus suddenly created, as the direct and immediate consequence of the act of the Government at Bogotá, was, as has already been observed, one that deeply concerned not only this Government but the whole civilized world; but the interests of the United States were especially implicated by reason of the treaty of 1846 with New Granada. This treaty is frequently cited in Colombia's 'statement of grievances,' and the United States is repeatedly charged with having violated it. But, while its terms are employed as the basis of every accusation against this Government that they can with any plausibility be made to support, its great and fundamental design, the disregard of which by Colombia produced the revolution on the Isthmus, is wholly passed over and neglected. The Department is obliged to remedy this defect.

"In speaking of the treaty of 1846 both Governments have in mind the thirty-fifth article, which forms in itself a special and distinctive international engagement. By this article—

"the Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be free and open to the Government and citizens of the United States.

"In return—

"the United States guarantees positively and efficaciously to New Granada . . . the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed,

and—

"in consequence the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

"The circumstances in which these engagements originated are matters of history. For some years exceptional efforts had been put forth to secure the construction of an interoceanic canal, and it was commonly believed that certain European governments, and particularly that of Great Britain, were seeking to obtain control of the transit routes. That no capitalist could be found to engage in the construction of a canal without some greater security for their investments than the feeble and irregular local governments could afford was universally admitted. But, on the other hand, it was apprehended that the introduction of European monarchical interests would prove to be but the beginning of a process of colonization that would in the end be fatal to the cause of republican government.

"In this predicament all eyes were turned to the United States. The first result was the conclusion of the treaty of 1846 with New Granada. Its primary object was to assure the dedication of the Isthmus to purposes of interoceanic transits, and above all to the construction of an interoceanic canal. President Polk, in submitting it to the Senate, assigned as the chief reason for its ratification that a passage through the Isthmus—

"would relieve us from a long and dangerous navigation of more than nine thousand miles around Cape Horn, and render our communication with our own possessions on the north-west coast of America comparatively easy and speedy.

"It is true that the treaty did not require Colombia to permit such a passage to be constructed; but such an obligation was so obviously implied that it was unnecessary to express it.

"Apart from the adaptation of the Isthmus to interoceanic transit, and its use for that purpose, there existed, as between the United States and New Granada, no common reason for the treaty's existence. This has always been well understood by both Governments. In a note of the Colombian chargé d'affaires at Washington, of January 3, 1899, commending the Panama enterprise to the good will of this Government, reference is made to the advantages which the United States 'would derive from the Panama Canal, when studied in the light of that international agreement,' the treaty of 1846. The same treaty was expressly incorporated into and perpetuated in the Hay-Herran convention. And it may be added that the Panama Canal, so far as it has progressed, was built under the protection of the same engagement.

"The guaranty by the United States of the neutrality of the Isthmus, and of the sovereignty and property of New Granada thereover, was given for the conservation of precisely this purpose. To this end the United States undertook to protect the sovereign of the Isthmus from attacks by foreign powers. The powers primarily in view were those of Europe, but the treaty made no discriminations. The theory on which the 'statement of grievances' proceeds, that the treaty obliged the Government of the United States to protect the Government of New Granada against domestic insurrection or its consequences, finds no support in the record, and is in its nature inadmissible.

"Only a few years before the treaty was made the original Republic of Colombia was dissolved into the States of Venezuela, Ecuador, and New Granada, and since the treaty was made the Republic of New Granada has been successively transformed into the United States of Colombia and the present Republic of Colombia. With these internal changes the Government of the United States was not permitted to concern itself, so far as they did not affect its treaty rights and obligations. Indeed, it is not to be imagined that New

Granada desired or that the United States would have been willing to take part in the former's internal revolutions.

"That the United States has faithfully borne, during the long period since the treaty was concluded, the full burden of its responsibilities does not admit of question.

"A principal object of New Granada [said Mr. Fish, in a note to the Colombian minister of May 27, 1871] in entering into the treaty is understood to have been to maintain her sovereignty over the Isthmus of Panama against any attack from abroad. That object has been fully accomplished. No such attack has taken place, though this Department has reason to believe that one has upon several occasions been threatened, but has been averted by warning from this Government as to its obligations under the treaty.

"In January, 1885, when Colombia appealed to the United States in the hope of averting the hostilities with which she was believed to be threatened on account of the Italian subject, Cerruti, this Government caused an intimation to be made of the serious concern which it—

"could not but feel were a European power to resort to force against a sister republic of this hemisphere as to the sovereign and uninterrupted use of a part of whose territory we are guarantors, under the solemn faith of a treaty.

"Such is the spirit in which the United States has on various occasions discharged its obligations.

"The United States has done more than this. It has assumed and discharged, as if primarily responsible, duties which in the first instance rested on Colombia. According to the language of the treaty, the right of the Government and people of the United States to a free and open transit across the Isthmus was guaranteed by New Granada; but the United States has been able to secure the benefits of it only by its own exertions; and in only one instance, and that as far back as 1857, has it been able to obtain from Colombia any compensation for the injuries and losses resulting from her failure to perform her obligation. The Department deems it unnecessary now to enter into particulars, but is abundantly able to furnish them.

"Meanwhile, the great design of the treaty of 1846 remained unfulfilled; and in the end it became apparent, as has heretofore been shown, that it could be fulfilled only by the construction of a canal by the Government of the United States. By reason of the action of the Government at Bogotá in repudiating the Hay-Herran convention, and of the views and intentions disclosed in connection with that repudiation, the Government was confronted, when the revolution at Panama took place, with the alternative of either abandoning the chief benefit which it expected and was entitled to derive from the treaty of 1846, or of resorting to measures the necessity of which it could contemplate only with regret.

"By the declaration of independence of the Republic of Panama a new situation was created. On the one hand stood the Government of Colombia invoking in the name of the treaty of 1846 the aid of this

Government in its efforts to suppress the revolution; on the other hand stood the Republic of Panama that had come into being in order that the great design of that treaty might not be forever frustrated, but might be fulfilled. The Isthmus was threatened with desolation by another civil war; nor were the rights and interests of the United States alone at stake—the interests of the whole civilized world were involved. The Republic of Panama stood for those interests; the Government of Colombia opposed them. Compelled to choose between these two alternatives, the Government of the United States, in no wise responsible for the situation that had arisen, did not hesitate. It recognized the independence of the Republic of Panama, and upon its judgment and action in the emergency the powers of the world have set the seal of their approval.

“In recognizing the independence of the Republic of Panama the United States necessarily assumed toward that Republic the obligations of the treaty of 1846. Intended, as the treaty was, to assure the protection of the sovereign of the Isthmus, whether the government of that sovereign ruled from Bogotá or from Panama, the Republic of Panama, as the successor in sovereignty of Colombia, became entitled to the rights and subject to the obligations of the treaty.

“The treaty was one which in its nature survived the separation of Panama from Colombia. ‘Treaties of alliance, of guaranty, or of commerce are not,’ says Hall, ‘binding upon a new state formed by separation;’ but the new state ‘is saddled with local obligations, such as that to regulate the channel of a river, or to levy no more than certain dues along its course.’ (International Law, 4th edition, p. 98.) To the same effect it is laid down by Rivier ‘that treaties relating to boundaries, to water courses, and to ways of communication,’ constitute obligations which are connected with the territory and follow it through the mutations of national ownership. (Principes du Droit des Gens, I, 72–73.) This Government, therefore, does not perceive that, in discharging in favor of the present sovereign of the Isthmus its duties under the treaty of 1846, it is in any way violating or failing in the performance of its legal duties.

“Under all the circumstances the Department is unable to regard the complaints of Colombia against this Government, set forth in the ‘Statement of grievances,’ as having any valid foundation. The responsibility lies at Colombia’s own door rather than at that of the United States. This Government, however, recognizes the fact that Colombia has, as she affirms, suffered an appreciable loss. This Government has no desire to increase or accentuate her misfortunes, but is willing to do all that lies in its power to ameliorate her lot. The Government of the United States, in common with the whole civilized world, shares in a sentiment of sorrow over the unfortunate conditions which have long existed in the Republic of Colombia by

reason of the factional and fratricidal wars which have desolated her fields, ruined her industries, and impoverished her people.

"Entertaining these feelings, the Government of the United States would gladly exercise its good offices with the Republic of Panama, with a view to bring about some arrangement on a fair and equitable basis. For the acceptance of your proposal of a resort to The Hague tribunal, this Government perceives no occasion. Indeed, the questions presented in your 'Statement of grievances' are of a political nature, such as nations of even the most advanced ideas as to international arbitration have not proposed to deal with by that process. Questions of foreign policy and of the recognition or nonrecognition of foreign states are of a purely political nature, and do not fall within the domain of judicial decision; and upon these questions this Government has in the present paper defined its position.

"But there may be, no doubt, other questions which may form a proper subject of negotiation; among them, for instance, the establishment of diplomatic relations between the Republics of Colombia and Panama, the delimitation of their respective boundaries, the possible apportionment of their mutual pecuniary liabilities. If the Government of Colombia will take these matters up, with any others which they think may require discussion, and will put their suggestions in regard to them in a definite and concrete form, they will receive at the hands of this Government the most careful consideration, with a view to bringing them, in the exercise of good offices, to the attention of the Government of Panama."

Mr. Hay, Sec. of State, to Gen. Reyes, special minister of Colombia, Jan. 5, 1904,  
For. Rel. 1903, 294-306.

"I have received the note which your excellency  
**Gen. Reyes' note of** did me the honor to address to me under date of the  
**Jan. 6, 1904.** 30th of December last, in answer to mine of the 29th  
of the same month. I transmitted it by cable to my Government  
and have received from it instructions to make to your excellency's  
Government the following declarations:

"First. That the said note of the 30th of December from your excellency is regarded by my Government as an intimation that the Colombian forces will be attacked by those of the United States on their entering the territory of Panama for the purpose of subduing the rebellion, and that for that reason, and owing to its inability to cope with the powerful American squadron that watches over the coasts of the Isthmus of Panama, it holds the Government of the United States responsible for all damages caused to it by the loss of that national territory.



"Second. That since the 3d of November last the revolution of Panama would have yielded, or would not have taken place, if the American sailors and the agents of the Panama Canal had not prevented the Colombian forces from proceeding on their march toward Panama, and that I, as commander in chief of the army of Colombia, would have succeeded in suppressing the revolution of Panama as early as the 20th of the same month if Admiral Coghlan had not notified me in an official note that he had orders from his Government to prevent the landing of Colombian forces throughout the territory of the Isthmus.

"Third. That the charges officially made against the Government and Senate of Colombia that it was opposed to the work of the Panama Canal, and that its purpose was to obtain a greater amount of money from the American Government and to recover the concession of the French company are unfair and groundless, and the proof of this assertion is that the Colombian Senate refused to ratify the Hay-Herran treaty, not because a greater sum of money was demanded, but because the treaty was contrary to the constitution of the country, which prohibits the cession of sovereignty over national territory; but the necessity of the canal is so well recognized in Colombia that it was proposed, in the discussion of the Senate, to amend the constitution in order to remove the constitutional difficulty, and the minister of foreign relations, after the sessions of Congress were closed, directed the chargé d'affaires, Doctor Herran, to advise the Government of your excellency that that of Colombia was ready to enter into renewed negotiations for a canal convention, and that it purposed to remove the existing constitutional difficulties. The charge made against the Government of Colombia that it purposed to cancel the concession of the French company vanishes as soon as it be known that under the latest extension granted to it by Colombia the said concession would not lapse until the year 1910.

"Fourth. That the failure of the Colombian Senate to ratify the Hay-Herran treaty, for the reasons above stated, can not be regarded as an act of discourtesy or unfriendliness, as the minister of foreign relations of Colombia, Señor Rico, told the minister of the United States, Mr. Beaupré, at Bogotá, because a treaty prior to its ratification is nothing but a project which, according to the laws of nations, neither confers rights nor imposes obligations, and therefore its rejection or delay in its ratification gives no ground for the adoption of measures tending to alter the relations of friendship between the two countries. If it were not so, the mere act of preparing a public treaty would be an occasion for serious danger instead of an element of peace and progress, which is the predicament in which Colombia finds herself at present, owing to her weakness.

"Fifth. That while the treaty of 1846 gives to the Government of the United States the right to maintain and protect the free transit of the Isthmus at the request of Colombia and when the latter is unable to do so, it places it under the obligation of enforcing the respect of Colombia's sovereignty over the territory of the Isthmus, and that the American Government has now not only failed to discharge that duty, but has prevented the Colombian forces from recovering the national sovereignty on the Isthmus, and thus the said treaty of 1846 being in full force, Colombia holds that the Government of the United States has no other reason than that of its own strength and of Colombia's weakness for interpreting and applying it in the manner it has; that is to say, for availing itself of the advantages and rights conferred by the treaty, and refusing to fulfill the obligations imposed thereby.

"Sixth. That it is known, from sworn statements, that the garrisons of Panama and Colon were bought with gold brought from the United States, toward the end of October, by the Panama revolutionists.

"Seventh. That if these revolutionists had not relied, and did not now rely, on the armed protection of the United States, whose powerful squadrons on both the Pacific and Atlantic oceans have prevented, and are preventing, since the 3d of November, the Colombian army from landing its forces, the Panama revolution would have been foiled by Colombia in a few hours.

"Eighth. That the Government of Colombia, holding a perfect right that the cession of the compact with the French canal company be not effected without its express consent, has instituted an action against the said company before the French courts and asked that the contract made with the American Government be declared null and void.

"Ninth. That on the grounds above stated, the Government of Colombia believes that it has been despoiled by that of the United States of its rights and sovereignty on the Isthmus of Panama, and not being possessed of the material strength sufficient to prevent this by the means of arms (although it does not forego this method, which it will use to the best of its ability), solemnly declares to the Government of the United States:

"(1) That the Government of the United States is responsible to that of Colombia for the dismemberment that has been made of its territory by the separation of Panama, by reason of the attitude that the said Government assumed there as soon as the revolution of the 3d of November broke out.

"(2) That the contract made between the United States and the French canal company is null, since it lacks the consent of Colombia,

and the latter has already brought suit against the said canal company before the French courts in the defense of its interests.

“(3) That the Government of Colombia does not nor will it ever relinquish the rights it possesses over the territory of the Isthmus of which it is now despoiled by the American forces, and will at all times claim the said rights and try to vindicate them by every means within its reach, and that for that reason the title over the territory of the Isthmus that may be acquired by the United States for the opening of the canal is void, and Colombia reserves to herself the right to claim the said territory at any time.

“(4) That if the work of the Panama Canal is undertaken and carried to completion in disregard and trespass of the rights of Colombia, the latter puts it on record that she was denied justice by the United States; that she was forcibly despoiled of the territory of the Isthmus in clear violation of the treaty of 1846, and that she does not relinquish the rights she possesses over the said territory, and holds the United States responsible for the damages caused to her.

“(5) That Colombia, earnestly wishing that the work of the canal be carried into effect, not only because it suits her interests but also those of the commerce of the world, is disposed to enter into arrangements that would secure for the United States the execution and ownership of the said work and be based on respect for her honor and rights.

“(6) That the United States has never protected Colombia on the Isthmus of Panama against foreign invasion, and that when it has intervened to prevent the interruption of the traffic it has been in help, or been at the suggestion of the Government of Colombia. In this one instance it did so on its own initiative, with the obvious purpose of protecting the secession of the Isthmus. The guarantee of neutrality, if it were privileged, would estop the sovereign of the land from maintaining order, which is contrary to the fundamental principles of every government; and

“(7) That the course followed by the American Government at Panama at the time when Colombia enjoyed peace, after overcoming a revolution of three years' duration, which left her exhausted, is in favor of any rebellion, but not of the maintenance of order, which is contrary to the principles and antecedents of the policy of this great nation as established in the war of secession.

“As the treaty with Panama, by which the rights of Colombia on the Isthmus are plucked from her, is now under discussion in the American Senate, I respectfully ask of your excellency that my note of December 23 and the present one be submitted to that high body, so that they may be taken into account in the discussion of the rights of Colombia.

"Inasmuch as official charges have been made against my country in the documents sent to the Senate, I give notice to your excellency that, in reply to those charges, I will publish my note of the 23d of December and the present one.

"I beg that your excellency will answer, as soon as possible, my aforesaid note of the 23d of December."

Gen. Reyes, special minister of Colombia, to Mr. Hay, Sec. of State, Jan. 6, 1904,  
For. Rel. 1903, 306-309.

**Mr. Hay's note of  
Jan. 9, 1904.** "I have the honor to acknowledge receipt of your excellency's note of the 6th of January, 1904, which I have read with most respectful care.

"I find that almost all the propositions brought forward in this communication have been considered and fully answered in advance in the note I had the honor to address you on the 5th day of January. I need, therefore, only briefly refer to a few matters which you have brought forward for the first time in your note of the 6th of January. In the first paragraph of your note you state that your Government regards my note to you of the 30th of December as an intimation that the Colombian forces will be attacked by those of the United States on their entering the territory of Panama. This inference of yours is wholly gratuitous. We have considered it our duty to represent to you the serious responsibility which would have been assumed by Colombia in a hostile demonstration of the character you mention, and, at the same time, you were assured that the United States Government in that event would reserve its liberty of action and be governed by the circumstances of the case.

"Your excellency is pleased to assert that if this Government had not intervened to preserve order on the Isthmus you would have been able to put an end to the revolutionary government in Panama in a few hours. This is hardly consistent with your statement that the late insurrection in Panama lasted three years. No human sagacity can decide with certainty what would have been the duration or result of such a conflict as would have ensued, nor what would have been the amount of bloodshed and devastation which would have afflicted the Isthmus, or the sum of the injury which would have resulted to the world at large if this Government had not taken the action of which you complain.

"In the third paragraph of your note you repeat your claim that the action of your Government in respect to the canal treaty was not prompted by any desire for additional compensation, but solely by a regard for your constitutional law. In reply to this I can only refer your excellency to the repeated intimations we received during the discussion of the treaty in Bogotá from the highest and most honorable personages in the Republic, that a large increase of the pecuniary

consideration would result in the ratification of the convention; to the attempt which was made to induce the French canal company to pay an enormous sum for permission to dispose of their property; and to the report of the canal committee to the Colombian Senata, suggesting the delay of all proceedings until the coming year, when the extension of the concession might be declared invalid and the nation might be in condition to deal with us without regard to the French shareholders. Your reference to the constitutional question I have already answered. The treaty which Colombia made and then rejected contained no cession of sovereignty; but, on the contrary, preserved the sovereignty of Colombia scrupulously intact.

"I do not consider that this Government is called upon to take notice of your statement as to the sources from which the revolutionary government obtained its funds. As this Government had no participation in the preparation of the revolution, it has no concern with the details of its history.

"I note with regret the continued protest you make in the name of your Government against the events which have taken place in Panama, and the determination of Colombia not to accept the situation to which they have given rise. I am in harmony with the sincere desire of the Government and the people of the United States in hoping that your Government may see its way to conclusions more in accordance with its true interests and those of its sister American Republics, and that it may not reject the friendly assurances I am charged to convey to you.

"I will not for a moment accept the imputation of unfriendly motives or sentiments on the part of this country toward Colombia, and, even if Colombia should persist in assuming a hostile attitude toward us, it will only be after the most careful deliberation and with extreme reluctance that this Government would shape its course in accordance with the deplorable conditions thus created."

Mr. Hay, Sec. of State, to Gen. Reyes, special minister of Colombia, Jan. 9, 1904,  
For. Rel. 1903, 309-311.

**Gen. Reyes' note of  
Jan. 11, 1904.** "I have the honor to acknowledge the reception of your excellency's notes of the 5th and 9th of the present month of January. In the first your excellency answers my statement of grievances of the 23d of December last; in the second your excellency makes a reply to my note of the 6th instant, containing various declarations.

"I must state that, notwithstanding the respect that I owe to your excellency's efforts, I find in the present case that my arguments have not been refuted by the otherwise forceful papers to which I am referring. I could abide by and even further fortify my arguments, which the very cause they support make unanswerable, but I can see

no result for such a course, since, under the circumstances that surround the debate, there is, on the part of your excellency's Government, no opinion to form, but a decision already reached.

"I therefore confine myself to submitting a few remarks on your excellency's position in regard to my request that the pending difference be referred to The Hague tribunal.

"True, it lies with the several states to recognize a new member of the family of nations; but haste and circumstances may always involve a disregard of international law while profession is made to maintain it.

"The recognition of a new state separated from a friendly nation would be a legitimate act on the part of foreign nations, in so far as they observe strict neutrality between the contesting parties; but it is a violation of the principles that govern the relations of the international community when one of the belligerents is hindered from the exercise of his rights and the use of his forces, and much more so when a public treaty is infringed. The treaty of 1846 being in force between the Governments of the United States and of Colombia, the dilemma that confronted the former when the movement occurred at Panama may not have been that which your excellency contemplates, but rather the following: Either to recognize that Panama was an integral part of Colombia or invest it with the character of a separate entity.

"In the first case, whatever be the position of your excellency's Government touching neutrality in intestine strifes, it had no cause for preventing Colombia from subduing the rebellion; in the other case the Government of the United States was obligated to enforce the respect of Colombian sovereignty, and, in either event, it is as untenable a proposition in law to hold obligations toward a nation as fulfilled in one of its rebellions or separated provinces as, in mathematics, to insist that the part and the whole are equivalent. And it is fit here to observe that the reason why I asserted to your excellency that if I had not been prevented from landing the forces under my command on the 19th of November, fifteen days after the rebellion had broken out, it would have been immediately smothered, is that the garrison bought off in Panama did not exceed 200 men.

"At the close of the first of the notes hereby answered, your excellency, referring to my proposal to refer to the arbitration of The Hague tribunal the claims that my country desires to have settled in an amicable and decorous manner, states that the questions presented in my statement of grievances 'are of a political nature such as nations of even the most advanced ideas as to international arbitration have not proposed to deal with by that process.' I must point out to your excellency that the infringement of the treaty of 1846 has resulted in civil consequences of the greatest import which do come

within the scope of the jurisdiction of courts. Colombia, for instance, has no claim against Germany, France, England, etc., by reason of the recognition of Panama as an independent State, little as the proceeding may be a friendly act, because she had and has no treaty with those countries that made them guarantors of her sovereignty and ownership; but with your excellency's Government the case is very different, for reasons that may be ignored but which will live as long as the sense of justice, slow but sure, shall endure in this world.

"The injuries that Colombia has already suffered and will continue to suffer in consequence of the infringement of the treaty are manifest and actual, and the refusal to entertain her claims as well as her lacking the strength to secure redress put her under the painful necessity of asking of the mighty Government and people of the United States that the tribunal called upon to decide her case be one of unquestionable standing and impartiality. I have such a high opinion of your excellency's sound judgment that I still permit myself to hope that it will bring about a reconsideration of your decision or a suggestion to my Government of some other means of doing Colombia justice in a manner compatible with her honor.

"I see from the second paragraph of your excellency's note of the 9th instant that the American Government does not and can not consider as a declaration of war on the part of Colombia the fact that the army of my country should enter Colombian territory, as is that of Panama, for the purpose of subduing the rebellion. This makes me confident that there will be no conflict between the Colombian and American forces when the former take the field on the Isthmus. And I have to point out here that, contrary to the statement made in official documents, Panama never was independent or belonged to any nation other than Colombia since the latter gained her independence. All of the royal letters patent issued from 1533 to 1803 incorporated the provinces of Darien, Portobelo, and Veragues, which embraced the whole territory of the Isthmus, into the viceroyalty of the new kingdom of Granada. The declaration of 1821, made by those provinces when New Granada had already cleared the country of the enemy that held the former viceroyalty under its yoke, was nothing more, in fact, than the sanction of the *uti possidetis* of 1810, the main foundation of the rights of all Spanish-American countries.

"I profoundly regret, on the failure of the mission which was intrusted to me, that my well-meant efforts to reach a fair and honorable settlement with your excellency's Government have thus far been in vain, and compelled, as I am thereby, to depart, I once more confirm the contents of my previous notes and, in the name of Colombia, enter a solemn protest against the denial of justice inflicted on my country by one of the most powerful governments in the world,

bound by its very power to be equitable, and put on your excellency's Government the responsibility for all evils to come.

"Being unable, under existing circumstances, to take personal leave of the most excellent President and of your excellency, I beg you will accept this excuse and the expression of my thanks for the personal attentions I have received at the hands of all the members of the Administration."

Gen. Reyes, special minister of Colombia, to Mr. Hay, Sec. of State, Jan. 11, 1904,  
For. Rel. 1903, 311-313.

"I have the honor to acknowledge receipt of your  
**Mr. Hay's note of** excellency's communication of the 11th of January,  
**Jan. 13, 1904.** 1904, in which you ask that this Government shall reconsider its decision in regard to the submission of the claims of Colombia to the arbitration of The Hague, or, as an alternative to this you invite a suggestion to your Government of some other means of doing Colombia justice in a manner compatible with her honor.

"In reply I beg to inform you that this Government sees no reason to reconsider its attitude in these matters, which has been adopted after mature deliberation and reflection.

"Referring to your communication above mentioned, and also to the conversation which I had the honor to hold with your excellency on the same day, I am now instructed by the President to make the following suggestion. This Government is now, as it always has been, and as I have frequently had the honor to inform your excellency, most desirous to lend its good offices for the establishment of friendly relations between the Republic of Colombia and that of Panama. We think that they might be exercised with a hope of a favorable result if Colombia, as may be inferred from our interchange of views, should consider that the conditions necessary to its recognition of the existing state of things are:

"First. To submit to a plebiscite the question whether the people of the Isthmus prefer allegiance to the Republic of Panama or to the Republic of Colombia.

"Second. To submit to a special court of arbitration the settlement of those claims of a material order which either Colombia or Panama by mutual agreement may reasonably bring forward against the other, as a consequence of facts preceding or following the declaration of independence of Panama."

Mr. Hay, Sec. of State, to Gen. Reyes, special minister of Colombia, Jan. 13, 1904,  
For. Rel. 1905, 313-314.



## (2) PASSPORTS.

## § 345.

With reference to complaints that the consul of New Granada at New York required citizens of the United States embarking for the Isthmus to obtain passports from him, the Department of State said that, although, according to the letter of the treaty of 1846, if citizens of New Granada who were about to return home were by the laws of that Republic required to obtain passports from the New Granadian consul at the port of embarkation, United States citizens might be expected to pursue the same course, yet, when the motives of the two governments in entering into the stipulations concerning the Isthmus were considered, the requirement referred to "would seem to be adverse to the spirit of the instrument." "The exaction of passports from travelers in time of peace is," affirmed the Department, "a restriction upon personal freedom scarcely compatible with republican institutions." It was difficult for citizens of the United States "to understand the necessity for its adoption in New Granada," and, being aware of the weighty obligations of their Government with regard to the Isthmus, it was "particularly repugnant to their feelings to apply for passports across it to consuls of New Granada." This sentiment "might be mitigated if such passports were gratuitously furnished," as were those of the Department; but, as the contrary was the case, the practice of requiring them would give rise to acts which the United States could not prevent and which it would seem impolitic for New Granada to provoke without a clear necessity therefor. The existing good feeling in the United States toward New Granada should be preserved and strengthened; and the New Granadian Government therefore should be informed "that the practice of requiring New Granadian passports for our citizens crossing the Isthmus will be certain to impair this sentiment, especially if a fee is required for them, and that this Government expects, in view of the advantages which New Granada has obtained by the treaty, that the practice will be discontinued."

Mr. Clayton, Sec. of State, to Mr. Foote. min. to Colombia, April 13, 1850, MS. Inst. Colombia, XV. 142; Mr. Clayton, Sec. of State, to Messrs. Livingston, Wells & Co., April 13, 1850, 37 MS. Dom. Let. 504.  
See, *infra*, § 357, as to treaty of 1867 with Nicaragua.

## (3) TRANSIT OF THE MAILS.

## § 346.

A postal convention, with special reference to the transit of the Isthmus, was concluded between the United States and New Granada, March 6, 1844. Correspondence subsequently took place with refer-

ence to arrangements for the carriage of the mails and the payment of postage.<sup>a</sup>

The convention required payment for the transportation of the United States mails to be made in dollars, but no standard dollar was mentioned. The United States maintained that the convention was complied with by the tender of a standard dollar of Spain or Mexico, containing eight reals, instead of a New Granadian dollar, estimated at ten reals.<sup>b</sup>

It was stated in 1866 that it could not be ascertained from the records of the Department of State that the convention had been terminated by notice pursuant to the stipulations of its 9th article.<sup>c</sup> In 1876 it was stated that, as it was not in terms abrogated by Art. XXXV. of the treaty of 1846, and as no notice of termination appeared to have been given, it might be regarded "as technically in full force," but that it might, nevertheless, be "allowed to have been practically abrogated by the treaty of 1846, followed as this instrument soon was by the acquisition of California by the United States;" and, "as a proof of the obsolete character" of the convention, it was remarked that it provided for the carriage of the United States mails in men of war to Chagres or Porto Bello.<sup>d</sup>

By the charter of the Panama Railroad Company, the company possessed the right to transport mails across the Isthmus and to receive pay for the service; and by a decree of May 31, 1851, the Government of New Granada vested in the company all right and control over the subject. For the exercise of the privilege, the company agreed to pay the State of Panama 5 per cent. on the compensation it should receive for the transportation of foreign mails. By an agreement with the United States, the company received 22 cents a pound for the transportation of the American mails across the Isthmus. The aggregate amount paid to the company under this arrangement in 1855 was about \$125,000. April 25, 1856, the New Granadian Congress passed an act imposing, for the privilege thus liberally paid for through the company, "the enormous sum of \$3.20 for every pound of mail matter which may pass the Isthmus within her territory." The amount which would thus be exacted was estimated at from \$300,000 to \$2,000,000 per annum. The United States protested against the measure, on the ground that it could not be applied to the United States mails "without a violation of the existing treaty between the

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<sup>a</sup> Mr. Clayton, Sec. of State, to Gen. Herran, Colombian min., June 30, July 18, 1849; to Mr. Rivas, Colombian min., Jan. 29, March 26, May 15, 1850: MS. Notes to Colombia. VI. 10, 12, 15, 18, 19.

<sup>b</sup> Mr. Clayton, Sec. of State, to Mr. Foote, min. to Colombia, June 15, 1850, MS. Inst. Colombia, XV. 145.

<sup>c</sup> Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Nov. 12, 1866, MS. Inst. Colombia, XVI. 207.

<sup>d</sup> Mr. Fish, Sec. of State, to Mr. Scruggs, min. to Colombia, June 3, 1876, MS. Inst. Colombia, XVII. 21.

United States and New Granada, and without an infringement of the chartered rights of the Panama Railroad Company," and added: "Were there no treaty stipulations on the subject, an attempt to enforce this decree against the United States could not be viewed otherwise than an unfriendly act on the part of New Granada, and would be resisted as a wrong; but the treaty with New Granada is regarded as a barrier against such an attempt and will justify effective resistance to it."

Mr. Marcy, Sec. of State, to Mr. Bowlin, min. to Colombia, July 3, 1856, MS. Inst. Colombia, XV. 220. See, also, same to same. confidential, July 3, 1856, id. 227; and Mr. Marcy to Mr. Hoadley, Pres. Panama R. R. Co., June 17, 1856, 45 MS. Dom. Let. 336.

In case an attempt should be made to apply the decree to the United States mails, the United States consul at Aspinwall was instructed to "protest in the most solemn and emphatic manner against it and warn them [the New Granadian authorities] of the serious consequences which must inevitably follow." (Mr. Marcy, Sec. of State, to Mr. Fletcher, consul at Aspinwall, Sept. 3, 1856, 20 MS. Desp. to Consuls, 396.)

See, also, Mr. Marcy, Sec. of State, to Gen. Herran, Colombian min., Dec. 22, 1856, MS. Notes to Colombia, VI. 57; President Pierce, annual message, Dec. 2, 1856; Mr. Cass, Sec. of State, to Gen. Herran, Sept. 10, 1857, MS. Notes to Colombia, VI. 71.

See the forcible statement of the subject in Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268.

#### (4) TAXATION AND COMMERCIAL REGULATIONS.

### § 347.

By a law of May 25, 1835, the privileges of free ports were granted by the Colombian Government to the districts of Panama and Porto Bello, for the term of 20 years. By a law of June 2, 1849, however, customs duties on the Isthmus were abolished indefinitely. National duties were thus done away with on the Isthmus, and the imposition of taxes was confined to the State of Panama, which, during and after 1850, levied direct taxes in the shape of a monthly "commercial contribution."

For. Rel. 1885, 227; Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268.

"No taxes should be paid by citizens of the United States in Colombia which are not made to apply equally to Colombian citizens and to the citizens or subjects of all other nations." (Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Feb. 10, 1865, MS. Inst. Colombia, XVI. 126.)

The President of Colombia having dissolved the national congress and proclaimed the existence of a state of civil war, it was reported that the authorities of the State of Panama were levying extraordinary taxes on "the citizens of that State, including all domiciled United States citizens," with a view to use the proceeds in carrying on war against the federal government. Although citizens of the United States enjoyed in Colombia "no lawful exemption from ordinary and equal taxes," it was

said to be by no means clear that they could be "legally or justly subjected to the payment of extraordinary taxes or contributions to the Government of a State for the purpose of resisting and, as it would now seem, absolutely overthrowing the federal union of Colombia, to which Government the United States are bound to guarantee a constitutional control, regulated by treaty with the United States, of the international railroad transit across the Isthmus of Panama." The situation, however, was declared to be imperfectly understood, and, for the time being, it was said that citizens of the United States might decline to pay the taxes and contributions above referred to, except under protest. (Mr. Seward, Sec. of State, to Mr. Sullivan, min. to Colombia, June 13, 1867, MS. Inst. Colombia, XVI. 221.)

For a circular issued by the Colombian consulate general at New York, Aug. 7, 1871, in relation to the dispatch of vessels to the free ports of Colombia, see Mr. Abert to Mr. Fish, Sec. of State, Aug. 17, 1871, MS. Misc. Let.

The Colombian Government having appointed an inspector at Aspinwall [Colon], who required all vessels desiring to trade on the Atlantic coast of Panama, first to visit that port and obtain a license and an approval of their manifests of cargo, for which a fee of \$5 was exacted, the United States commercial agent at Aspinwall advised masters of American vessels to refuse to comply with the requirement. The reason given for the measure was the necessity at the time of inspecting manifests, so as to prevent the carrying of contraband to the insurgents at Antioquia. The action of the commercial agent was not approved, the Department of State observing that Art. XXXV. of the treaty of 1846 did not include "the right of unrestricted trade between the Atlantic ports of the State of Panama."

Mr. Fish, Sec. of State, to Mr. Thorington, com. agent at Aspinwall, Jan. 24, 1877, 84 MS. Desp. to Consuls, 635.

In 1876 a correspondence took place at Bogota, between the diplomatic representatives of the United States, France, Germany, and Great Britain, and the Colombian minister of foreign affairs, with respect to the custody of the papers of foreign vessels entering the free ports of Colon and Panama. The correspondence grew out of the enactment of the Colombian statute, No. 60, of 1875, which (arts. 3 and 5) required such vessels to deliver their registers to Colombian officials. By a note of Señor Ancizar, Colombian minister of foreign affairs, of July 27, 1876, the conflict of the statute with the treaty obligations of Colombia in regard to the freedom of the ports of Colon and Panama and the Isthmian transit was recognized; and it was agreed that, until the law should be modified by the Colombian Congress, the registers of foreign vessels should be deposited with their respective consuls or, in case of absence, with the consul of a friendly power.

Mr. F. W. Seward, Act. Sec. of State, to Mr. Dichman, min. to Colombia, Aug. 23, 1878, MS. Inst. Colombia, XVII. 43. This instruction particularly refers to the case of the American schooner *Lorine*, and the alleged arbitrary action of the Colombian authorities with regard to her.

Subsequently, the Department of State expressed regret that, in spite of the diplomatic agreement of 1876, the execution of the law of 1875 was "likely to be persevered in." (Mr. Evarts, Sec. of State, to Mr. Dichman, min. to Colombia, Feb. 4, 1879, MS. Inst. Colombia, XVII. 71.)

As to the conclusion of a protocol providing for the deposit of ships' papers with the consuls, whereupon the law of 1875, though it remained unrepealed, was regarded by the Colombian Government as a dead letter, see Mr. Evarts, Sec. of State, to Messrs. Shipman, Barlow, Larocque & Macfarland, June 14, 1879, 128 MS. Dom. Let. 449.

"This Government is of the opinion that the position of the free ports of Panama and Colon as mere stations on one of the world's most important highways should demand a simpler and less rigid enforcement of customs rules against the vehicles of mere transient passage than may be requisite to protect the fiscal interests at ports of entry. It is deemed that the mutual concessions and guarantees under which the transit was established entitle all those who honestly and pacifically use it to exceptional facilities, which may not be needed, or be even proper at other ports. It would be very much to be regretted if a contrary course should prevail in conflict with the true interests of Colombia herself, no less than of those who avail themselves of the privileges incidental to the transit."

Mr. Frelinghuysen, Sec. of State, to Mr. Scruggs, Mar. 6, 1883, MS. Inst. Colombia, XVII. 329.

Sept. 25, 1885, the Colombian Government issued a decree, in execution of law 53 of 1884, establishing on Dec. 1, 1885, custom houses at Panama and Colon, and imposing on importations into the Republic the same customs duties as at other ports, less 40 per cent. It was also announced that the same customs regulations would be enforced at Colon and Panama as at other ports. The United States, while observing that the guarantee of Art. XXXV. of the treaty of 1846 was "limited to equal treatment of American goods with those of native Colombians or of the most favored nation, with an exemption from customs duties in the case of merchandise, etc., passing over the transit to countries beyond," and did not impose on Colombia a "treaty obligation to make Colon and Panama free ports," said that the "whole tenor" of the article was that nothing should be allowed "to hinder the free transit of persons and goods passing over the Isthmus, from ocean to ocean, to countries beyond," and that "should the collection of duties on imports into Colombia at Aspinwall [Colon] and Panama be enforced in such a way as to hamper the stipulated free transit this Government would feel bound to complain."

Mr. Bayard, Sec. of State, to Mr. Jacob, min. to Colombia, Nov. 3, 1885, For. Rel. 1885, 223; Mr. Porter, Assist. Sec. of State, to Messrs. Lazarus & Co., Oct. 31, 1885, id. 229. See, also, For. Rel. 1885, 226-228.

Aug. 27, 1855, the legislative assembly of the State of Panama passed an act imposing a tax of 20 cents a ton on *Tonnage taxes.* steamers and 40 cents a ton on sailing vessels resorting to the ports of Colon and Panama. By a decree of the executive of Panama, British mail steamers were exempted from these duties. Under the circumstances, the Department of State, in a note to the Colombian minister at Washington, Oct. 23, 1855, protested against the duties, both as a violation of Art. XXXV. of the treaty of 1846, guaranteeing a free transit across the Isthmus, and as a violation of Art. VI., prohibiting discriminating duties.

Meanwhile, the Executive Power of New Granada, by a resolution of October 14 (or Oct. 11), 1855, passed with the unanimous consent of the council, declared that the law of the State of Panama (Aug. 27, 1855) was inapplicable to the ports of Colon and Panama. Information of this action of the national authorities was conveyed to the minister at the Department of State by General Herran, the Colombian minister, received by the Department with Washington, Oct. 26, 1855, and a similar expression of satisfaction was made "great gratification." A United States minister at Bogota, who had, in the to Mr. Bowlin, United States minister at Bogota, who had, in the absence of instructions, exerted himself to secure the adjustment of the question with the Government of New Granada.

Mr. Marcy, Sec. of State, to Gen. Herran, Colombian min., Oct. 23, 1855, MS. Notes to Colombia, VI. 50; same to same, Nov. 17, 1855, id. 52; Mr. Marcy to Mr. Bowlin, Dec. 17, 1855, MS. Inst. Colombia, XV. 210; Mr. Marcy to Gen. Herran, Dec. 22, 1856, MS. Notes to Colombia, VI. 57.

Although the National Executive, in overruling the action of the State of Panama, pronounced it to be antagonistic to "considerations of justice and good faith," a bill was afterwards introduced into the National Congress and was reported to have been passed to enforce the collection of the tonnage tax under national authority. The United States protested against this measure on the ground (1) that it was contrary to the clear import of the treaty of 1846; (2) that it was contrary to the solemn pledge given not only to the railroad company but to the whole world that vessels resorting to the ports of Colon and Panama, in connection with any road across the Isthmus, should be exempt from tonnage duties; (3) that it was a palpable violation of the rights of citizens of the United States who had embarked their capital in the railroad, and, besides constituting a breach of contract with the company, was injurious to the commerce of the United States. In view of the "strong features" of the case, the United States decided "to resist the collection of the tonnage tax on American vessels resorting to the harbors of Aspinwall and Panama, with freight or passengers for the railroad." At the same time the hope was expressed that the Congress of New Granada would repeal "their obnoxious law relative to tonnage as well as the equally obnoxious and still more extortionate law in respect to foreign mails."

Mr. Marcy, Sec. of State, to Mr. Bowlin, min. to Colombia, Dec. 31, 1856, MS. Inst. Colombia, XV. 246.

See, also, Mr. Thomas, Assist. Sec. of State, to Mr. Corwine, consul at Panama, Jan. 3, 1857, 20 Desp. to Consuls, 438; Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, April 21, 1857, MS. Inst. Gr. Br. XVII. 72. Mr. Dallas was instructed to explain the demands of the United States to Lord Clarendon, should the latter refer to the subject in conversation.

June 27, 1857, the Congress of New Granada passed an act "recognizing the validity of the tonnage tax . . . , renewing it in fact, and directing the application of the proceeds to certain specified objects as a subsisting source of revenue." With reference to this statute, the Department of State said: "The decided opposition of this Government to the imposition of these taxes has been communicated to the Government of New Granada, and in addition it has likewise been made known that the attempt to collect a tonnage tax or a correspondence tax would be resisted by the United States. This determination was adopted and avowed by the late administration, and the President on full consideration concurs in its decision."

Mr. Cass, Sec. of State, to Gen. Herran, Colombian min., Sept. 10, 1857, MS. Notes to Colombia, VI. 71.

This determination was again expressed, with reference to a report that a bill had passed the Colombian House of Representatives and was pending before the Senate to repeal the act of 1835, "which pledged an exemption from all tonnage duties in the cantons of Porto Bello and Panama, a pledge offered to the world in order to draw foreign capital and enterprise to the construction of a canal or railroad, and which was to continue in force for the term of twenty years from the opening of such route." It was understood that the passage of the bill would be followed by the imposition of the tonnage tax. (Mr. Cass, Sec. of State, to Gen. Herran, Colombian min., June 4, 1858, MS. Notes to Colombia, VI. 77.)

See, particularly, the full and able argument on the subject of the tonnage tax in Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268, with a list of previous diplomatic papers on the subject.

The preceding position of the United States is impliedly approved in Mr. Black, Sec. of State, to Mr. Jones, Feb. 8, 1861, MS. Inst. Colombia, XV. 314.

See, also, Mr. Seward, Sec. of State, to Mr. Vanderbilt, Pres., Atlantic & Pacific S. S. Co., June 12, 1861, referring to a decision of the Supreme Court of New Granada, adverse to the grounds assumed by the company "in relation to the illegality of the law of Panama of 19th September, 1857, concerning taxes." (54 MS. Dom. Let. 173.)

"I do not feel called upon to discuss at length the subject of the commercial tax levied by the State of Panama, as referred to in your No. 13, of the 27th December last, for, since the receipt of that communication, I have examined the instructions of my predecessors Secretaries Cass and Marcy, and I find no reason for reversing the policy

so distinctly assumed and so forcibly maintained by them, in reference to the tonnage and other taxes imposed upon American commerce at the Isthmus of Panama. The 'commercial tax,' as it is called, appears to be a mere technical evasion of an objectionable nomenclature, but this unworthy evasion does not change the fact that the exaction falls upon those interests which alike by treaty stipulations and formal contract have been exempted from such impositions.

"In 1856 the naval officer in command of our Pacific squadron received orders to resist by force, if necessary, the collection of the tonnage taxes which this Government declared to be illegal. I refer you to Mr. Marcy's No. 29 of 31 December, 1856, to Mr. Bowlin, upon this point. I will send your No. 13 with its accompaniments and with a copy of this instruction to the Navy Department, with a request that, if a renewal of the orders of 1856 be requisite, in view of the lapse of time and change in the personnel of officers in command, such measures may be taken as will secure the protection of the interests of our citizens on the isthmus, to which they are entitled under the solemn guaranties of the government of New Granada."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Feb. 27, 1862, MS. Inst. Colombia, XVI. 30.

See, also, Mr. Seward, Sec. of State, to Mr. Corwine, Jan. 17, 1862, 56 MS. Dom. Let. 215.

"A tax has been levied, called a commercial tax, the object and intent of which is to require a bonus for doing commercial business in the State of Panama. This tax by some unusual and illegitimate construction has been made to apply to the Pacific Mail Steamship Co., the Panama Railroad Co., U. S. Mail Steamers, Vanderbilt &c. The P. M. S. S. Co. have paid it under protest. Mr. Nelson, agent for the P. R. R. Co., & U. S. Mail Steamers, has also paid it under protest. I learned from the British consul a few days ago that the governor of Panama had informed him that he would not enforce its execution. I have no official advice from the governor on the subject; but expect to learn his views and intentions at an early day. I have advised those interested not to pay another dollar, until the question is settled by our Government." (Mr. McKee, U. S. consul at Panama, to Mr. Burton, U. S. min. at Bogota, April 21, 1862, enclosed with Mr. Burton's No. 34, July 11, 1862.)

"You will instruct the consuls of the United States within your jurisdiction to advise the parties interested not to pay the 'commercial tax' which is being attempted to be collected from them under the Panama law of August 29, 1855, and in such cases as they have already paid it under protest, to make reclamation therefor." (Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Aug. 28, 1862, MS. Inst. Colombia, XVI. 48.)

"Having examined the subject referred to in your No. 95, in connection with your previous despatch No. 13, upon the same question, I am satisfied that the views which you originally expressed are correct; that the 'commercial contribution' levied by the State of Panama is only the substitution, under a different name, of an impost which this Government has uniformly held to be unconstitutional and illegal, under the public guarantees of the Republic of New Granada, and that for all such exactions paid under protest, this Government reserves the right



of future reclamation. With the State of Panama as an integral part of the Colombian Republic we have nothing to do. It rests with the Government of Colombia to enforce in the States under its jurisdiction respect to the plighted faith of the supreme authority." (Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, April 9, 1864, MS. Inst. Colombia, XVI. 93.)

"After diligent inquiry I cannot learn that any unjust or unequal taxes have been recently levied, and certainly no complaint of any has been made to me." (Commander G. H. Preble, U. S. N., to Mr. Burton, min. at Bogota, July 15, 1865, enclosed by Mr. Burton with his No. 190, Aug. 11, 1865, MS. Desp. from Colombia.)

"I have to acknowledge the receipt of your despatches, Nos. 125 and 126,—dated, respectively, October 17th and 22d last, with their enclosures,—the first of which relates to the protests of the Pacific Mail Steamship Company against the payment of the 'Commercial Tax' imposed by the State of Panama on that company, and, the second, to the demand made by a Colombian official at Aspinwall, for the payment of the same tax, by all vessels of the United States discharging freights at that port.

"The subject will receive the early consideration of this Department, and your proceedings in that connection were quite proper and meet my approbation."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Jan. 10, 1865, MS. Inst. Colombia, XVI. 116.

With his No. 125, referred to by Mr. Seward, Mr. Burton enclosed copies, received from Mr. McKee, United States consul at Panama, of the protests entered in the consulate by agents of the Pacific Mail S. S. Co., from Oct. 19, 1859, to May 14, 1862, against the payment of the "commercial contribution," as well as copies of certain receipts on which no protests were entered. (MSS. Dept. of State, Desp. from Colombia.)

With his No. 126, also referred to by Mr. Seward, Mr. Burton enclosed a correspondence in relation to a demand for payment of tonnage taxes by vessels discharging freight at Colon. This demand was made under art. 123 of the Colombian Custom House Law of May 9, 1864. Mr. Burton reported that the Colombian Minister of Foreign Relations had in a private interview informed him that it was not the intention of the Colombian Government to insist on the collection of the duty, the minister in this relation referring to an executive decree of Aug. 18, 1864, suspending the operation of art. 123 as to the free ports of the Republic. (MSS. Desp. from Colombia.)

See, also, Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Feb. 10, 1865, MS. Inst. Colombia. XVI. 126; and Nov. 12, 1866, id. 207.

Approval was expressed of the action of Rear Admiral Thatcher, in directing the commanding naval officer at Panama, in case an attempt should be made by the Colombian Government, after making a respectful remonstrance to the authorities of the Isthmus, to resist the collection of the tonnage tax by force if necessary, consulting at the same time the United States consul at Panama. It was stated, however, that there was "reason to believe that the Colombian Government will not persist in the measure which would necessitate the extreme proceedings contemplated." (Mr. Seward, Sec. of State, to Mr. Welles, Sec. of Navy, Feb. 10, 1867, 75 MS. Dom. Let. 235.)

"It has been intimated to the Department from a source likely to be well informed, that the New Granadian Government has imposed a capitation tax of two dollars on all persons embarking at Panama for California. It is hoped however, that the information may not be correct. If, upon inquiry, you should ascertain that it is, you will remonstrate against it in terms which will leave no doubt that this government considers it adverse to the spirit, at least, of the treaty of the 12th of December, 1846. It is true that citizens of the United States are by that treaty placed upon the same footing only as citizens of New Granada in regard to the transit of the Isthmus of Panama, but, inasmuch as the numbers of our citizens who cross that Isthmus for the purpose of proceeding to California greatly exceeds those of New Granada, while the tax would bear lightly upon the New Granadians it would be onerous to citizens of the United States and incompatible with that freedom of transit which it was the intention of the treaty to secure to us as an equivalent for our guaranty of the neutrality of the isthmus. You will accordingly intimate that it is the expectation of this government that the tax referred to or any other in contravention of the spirit of the treaty will be discontinued. The New Granadian Government has certainly derived and will continue to enjoy sufficient benefits, both directly and indirectly, from the trade and intercourse between our Atlantic coast and California by the way of the Isthmus, to dispense with a tax of the character referred to even if there were no treaty. You may assure them, however, that if, under existing circumstances, the tax shall be exacted, it will lead to great irritation in this country."

Mr. Clayton, Sec. of State, to Mr. Foote, min. to Colombia, Jan. 9, 1850, MS. Inst. Colombia, XV. 139.

See, in this relation, Mr. Everett, Sec. of State, to Mr. Conrad, Sec. of War, Nov. 18, 1852, 41 MS. Dom. Let. 93.

The tax above referred to was imposed under an ordinance passed Nov. 6, 1849, by the legislative assembly of the State of Panama. The ordinance took effect Jan. 1, 1850. It imposed a tax of \$2 per capita on all passengers embarking or disembarking in that State. In reply to the protest made through Mr. Foote, the New Granadian minister of foreign affairs declared that the national Government could not interfere to prevent the execution of the law by the State authorities. Under it, the Pacific Mail S. S. Co. paid to the State of Panama, in 1850-1853, about \$122,000, each payment being made under protest. (Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268.)

The Pacific Mail S. S. Co. presented a claim for reimbursement to the mixed commission under the claims convention between the United States and New Granada of Feb. 10, 1857, which was extended by the convention of Feb. 10, 1864. The claim was referred to the umpire, Sir Frederick Bruce, who observed in his decision that "a large portion" of the amount "was recovered by the company from the passengers." As to the legal aspects of the case, he said that the company did not appear

to have taken any steps to test the validity of the law, and that the failure to take such steps before the Colombian tribunals constituted a serious objection to the claim. As to the allegation of the claimant that the tax was a violation of Art. XXXV. of the treaty of 1846, Sir Frederick declared that "the tax, if a violation of the treaty at all, is a violation of the spirit and not of the letter of that instrument." He also stated that it did not appear that the United States "addressed any representations to the supreme government at Bogota denouncing the proceeding as a violation of the treaty." He therefore rejected the claim, without prejudice to the rights of the claimant, should the United States decide to make a demand for redress. In the course of his opinion he remarked that the Supreme Court of New Granada, in afterwards deciding a similar law to be invalid, put its decision on constitutional and not on treaty grounds. (Moore, Int. Arbitrations, II. 1412-1415.)

The opinion was incorrect in saying that the United States had not complained to New Granada that the tax was a violation of the treaty. (Mr. Seward, Sec. of State, to Mr. Stanbery, At. Gen., Nov. 14, 1866, 74 MS. Dom. Let. 382.)

Attorney General Akerman, in 1871, advised that the tax, being actually, though not ostensibly, levelled at citizens of the United States, defeated the plain intent of the treaty. (13 Op. 547.)

"Unfortunately for the claimants, however, it [the opinion of Attorney General Akerman] omits all notice of the principal point, which is whether it would be proper for this government, in view of the stringent terms of the 5th article [of the convention of Feb. 10, 1857], to demand of Colombia payment of a claim which had been rejected by the arbiter under the convention. It is true that Sir Frederick Bruce declared that his decision was not to prejudice the rights of the claimants. This declaration, however, must be regarded as extrajudicial and as not imposing liability on Colombia. Under these circumstances it is deemed advisable at least to defer a presentation of the case anew to that government." (Mr. Fish, Sec. of State, to Mr. Cox, M. C., March 14, 1872, 93 MS. Dom. Let. 139.)

By an act of the provincial assembly of Panama of Nov. 17, 1853, superseding the ordinance above mentioned, a tax of 10 per cent. was levied on the *profits* on each passenger arriving at or departing from the coast at either side, and the sum of \$10 was assumed as the "unalterable basis" of such profits.

The United States protested against this tax on the following grounds:

1. That, although New Granadians were nominally liable to it, it constituted practically a discriminating tax on foreign vessels, and especially upon vessels of the United States; that, according to the United States consul at Panama, the tax of 1849 was not in fact collected from New Granadian citizens; that there was no New Granadian vessel carrying passengers sailing to or from Panama; that the burden of the impost under consideration fell practically upon citizens of the United States, though the guarantee of neutrality was given to exempt them from "such partial and oppressive exactions."

2. That the tax violated the stipulation for a "free" transit, besides arbitrarily assuming a certain standard of profit.

3. That it was opposed to what had been the well understood policy of New Granada, as shown by art. 34 of the charter granted to the Panama Railroad Company, May 29, 1850, which guaranteed that passengers, merchandise, and effects of every kind, transported across the Isthmus from ocean to ocean by the railroad, should be exempt from taxes and imposts, whether national, provincial, municipal or of any other species.

Mr. Marcy, Sec. of State, to Mr. Green, Feb. 16, 1854, MS. Inst. Colombia, XV. 177.

April 4, 1854, Mr. Green wrote that the New Granadian minister of foreign relations had "expressed it as the fixed determination of the Government to remove every impediment to the full enjoyment of the rights of transit across the Isthmus, according to concessions heretofore made; and that this passenger tax should not be enforced because of its conflict with these resolutions." (Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, April 30, 1859, MS. Inst. Colombia, XV. 268.)

Oct. 26, 1854, the provincial assembly of Panama by a new law restored the more profitable tax of \$2 per capita on passengers embarking in the Bay of Panama. The Supreme Court of New Granada, April 23, 1855, however, on motion of the Attorney-General, declared the provincial laws of Nov. 17, 1853, and Oct. 26, 1854, to be null and void, as unconstitutional.

Mr. Marcy, Sec. of State, to Mr. Bowlin, min. to Colombia, Feb. 3, 1855, MS. Inst. Colombia, XV. 199; Mr. Hunter, Act. Sec. of State, to Mr. Bowlin, July 31, 1855, id. 205; Mr. Marcy to Mr. Bowlin, Aug. 31, 1855, id. 207.

In the instruction last mentioned, Mr. Marcy, referring to the report that the authorities of the State of Panama would, in spite of the decision of the Supreme Court, renew the tax, intimated that the United States would if necessary station a vessel of war at Colon and Panama to protect American citizens and vessels from the exaction.

"If the exaction should be made of your captains and agents, it might, in the first instance, be resisted, if there should be any means for judicially testing its legality. The Department does not feel justified, however, either in directing the payment of the tax, or in advising a peremptory disregard to the local law imposing it. But if there should be no means of testing the legality of the tax before the tribunals (as is suggested above), the payment, if made by the officers or agents of the company, should be accompanied in each case by a formal protest, until the result of an application on the subject which the United States minister at Bogotá has been instructed to make to the Government of New Granada shall be known, or other measures shall be adopted by this Government." (Mr. Marcy, Sec. of State, to Mr. Roberts, Pres. U. S. Mail S. S. Co., N. Y., Sept. 3, 1855, 44 MS. Dom. Let. 299.)

See, in the same sense, Mr. Marcy, Sec. of State, to Mr. Davidge, Pres. Pac. Mail S. S. Co., Aug. 7, and Aug. 28, 1856, 45 MS. Dom. Let. 432, 480.

See, also, Mr. Marcy to Mr. Davidge, Jan. 20, 1857, 46 MS. Dom. Let. 256.

See Mr. Cass, Sec. of State, to Gen. Herran, Colombian min., Sept. 10, 1857, MS. Notes to Colombia, VI. 71.

As to the question of the laying of taxes under the constitution of Colombia, the following may be noticed:

"Your dispatch of September 12th. No. 50, has been received.

"The view of the so-called Bolivar tax which you have presented is approved. It is not doubted that under the constitution of New Granada of 1858 the General or Federal Government alone has authority to levy duties on importations under its power to regulate foreign commerce. Nor does it seem doubtful that the United States having commercial relations with New Granada regulated by treaty may rightfully complain of any proceedings which affect their commerce in violation of the national constitution of New Granada, even though the wrong be committed under the alleged authority of one of the United States which constitute the national government of New Granada. The imposition of a tax by the State of Bolivar upon merchandise imported from the United States and yet remaining in unbroken bulk or package and upon which duties have been already paid to the National Government, under the national laws, seems so palpably a violation of the treaty of peace, amity, commerce and navigation existing between the two countries that it is presumed the national authorities will at once take the proper measures to produce a discontinuance of that injurious measure. You are instructed to persevere in your efforts to secure that end." (Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Jan. 30, 1863, MS. Inst. Colombia, XVI. 58.)

(5) TRANSIT OF TROOPS.

§ 348.

June 6, 1853, Mr. Paredes, chargé d'affaires of New Granada, complained that several hundred United States troops had crossed the Isthmus of Panama in July of the preceding year without the previous permission of the Congress of the Republic. Mr. Paredes complained of this as a violation of the New Granadian constitution. In reply, Mr. Marcy, who was then Secretary of State, said that the Secretary of War had at the time requested the opinion of the Department of State as to whether Art. XXXV. of the treaty of 1846 was intended to embrace the privilege of sending troops across the Isthmus, and that the opinion of the Department appeared to have been "unhesitatingly in the affirmative." That article, said Mr. Marcy, guaranteed that the right of way or transit across the Isthmus should be "open and free to the Government and citizens of the United States." It was obvious that the United States could have no other occasion for the free right of passage thus secured "than to send over that Ithmus persons in its employment in both the military and civil service." The grant was understood by the United States to be full and unqualified, and it could not be regarded as impaired by the provision of the constitution to which Mr. Paredes had referred. The treaty, observed Mr. Marcy, was approved by the Congress of New Granada, and it could not be supposed that that body, being acquainted with its own prerogatives, would have sanctioned an instrument that was supposed to trench upon them. On the contrary, it was not

improbable that the Congress of New Granada, having in view the provisions of the constitution and well aware that the treaty secured to the United States the right to send troops across the Isthmus, intended, by giving its sanction to the treaty, to confirm the privilege pursuant to the constitution itself. New Granada had, declared Mr. Marcy, received from the United States an ample equivalent for any sacrifices she may have made in entering into the treaty.

Mr. Marcy, Sec. of State, to Mr. Paredes, Colombian chargé d'affaires, June 20, 1853, MS. Notes to Colombia, VI. 35.

The views above expressed were reaffirmed by Mr. Marcy in another note to Mr. Paredes, October 12, 1853, MS. Notes to Colombia, VI. 43.

"The one main object of your mission is an understanding, clear and explicit, with regard to the right we insist upon of transporting our troops over the Isthmus of Panama, either to or from our possessions on the Pacific. We are in condition to make the guarantee we are pledged to effective, and we expect in return the reciprocal benefits arising therefrom, also pledged to us by treaty by the Republic of Colombia."

Mr. Seward, Sec. of State, to Gen. Sickles, special agent to Colombia, March 18, 1865, MS. Inst. Special Missions. II. 35.

Gen. Sickles' principal instructions were dated January 6, 1865. In these instructions Mr. Seward stated that the governor of Panama had lately refused Admiral Pearson permission to send across the Isthmus for embarkation at Aspinwall for New York "the insurgent conspirators who had been arrested at the former place with authority and instructions found upon them to seize United States mail steamers on the Pacific." In connection with this Mr. Seward stated that, while the treaty did not contain any grant of a specific privilege as to the transit of either troops or criminals, it certainly was by no forced construction of the instrument that the privilege was claimed. It might indeed be said that if the United States could not rightfully transport troops between Aspinwall and Panama, it could not fulfill one of the principal objects to New Granada for which the treaty was entered into. (MS. Inst. Special Missions, II. 29.)

February 27, 1865, General Salgar, Colombian minister in the United States, informed the Department of State that his Government desired to regulate in a definitive manner the transit of United States troops across the Isthmus. (Mr. Seward, Sec. of State, to Mr. Salgar, March 31, 1865, MS. Notes to Colombia. VI. 185.)

Mr. Burton, United States minister to Colombia, reported in his No. 173, May 13, 1865, that the authorities of the State of Panama refused in October 1864 to permit United States troops to cross the Isthmus. He added, however, that in January 1865 the Colombian Government gave confidential orders to the authorities at Panama to permit United States troops, armed or unarmed, and materials of war to cross the Isthmus without hindrance, at any and all times. (MS. Desp. from Colombia.)

President Murillo gave assurances to General Sickles that satisfactory instructions would be given to the authorities on the Isthmus with regard to the transit of United States troops. (Mr. Seward, Sec. of

State, to Mr. Burton, min. to Colombia, June 13, 1865, MS. Inst. Colombia, XVI. 130, referring to a report from Gen. Sickles of April 17, 1865.)

See, also, Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Sept. 15, and Sept. 27, 1865, MS. Inst. Colombia, XVI. 139, 140.

In acknowledging the receipt of Mr. Burton's 247 of June 26, 1866, setting forth certain limitations proposed by the president of Panama to the right of transit of the United States over the Isthmus, but at the same time expressing the opinion that the proposed change had been abandoned, the Department of State said: "The United States must be understood as not assenting to this proposed change in the orders of the president of Panama of May 13, 1865. But it is perhaps best to avoid all unnecessary discussion of the matter." (Mr. Hunter, Second Assist. Sec. of State, to Mr. Burton, min. to Colombia, Aug. 31, 1866, MS. Inst. Colombia, XVI. 199.)

In September 1865, Mr. Alexander McKee, United States consul at Panama, died. On the day of the funeral (Sept. 4). Admiral Pearson landed with a small marine guard, provided with cartridges without balls, and an unarmed band of music, with a view to attend the ceremonies. He had given no previous notice of his intentions to the authorities. On September 6 the president of Panama wrote to the Admiral, complaining of his action, and stating that it was expected that permission would in future be asked for landing armed forces; that he himself and other functionaries intended to be present at the funeral but abstained when they saw the naval forces landed. Further correspondence was exchanged. Mr. Seward expressed the opinion that the entire controversy was uncalled for. He thought that the admiral should have given notice of his intentions to the authorities, and that, when he landed without having done so, they had a right to ask for an explanation, but not of the admiral, who was not the proper person to address for the purpose. The president of Panama had taken a "jealous attitude." (MSS. Dept. of State.)

By a protocol signed February 22, 1879, by Mr. Arosemena, minister of foreign relations of Colombia, and Mr. Dichman, minister resident of the United States at Bogotá, it was declared that, in conformity with the note of the secretary of foreign relations of Colombia to the government of the State of Panama of May 15, 1865, the troops of the United States, as well as prisoners under federal jurisdiction, "can pass as the usual service of its administration, a right which is established in compensation for the guarantee of the sovereignty and property of the isthmus, to which the same government is bound." The protocol was approved by the Colombian Senate and also by the Secretary of State of the United States.

Moore on Extradition, I. 714-718; For. Rel. 1879, 273-277, 284.

#### (6) FUGITIVES FROM JUSTICE.

#### § 349.

In 1878 one Scrafford, who had been delivered up by Peru to the United States on a charge of forgery, was about to be taken across the Isthmus of Panama by the agent of the United States, when he

was released by the governor of Panama. The United States complained, and negotiations were entered upon for a definition of the right of transit under Art. XXXV. of the treaty of 1846. The negotiations resulted in the conclusion, February 22, 1879, of a protocol by which the right of transit of the Government of the United States, in respect of fugitives from justice, as well as of military forces, was recognized by the Government of Colombia. By a supplementary protocol of October 23, 1879, it was provided that the custody of prisoners, whose transportation across the Isthmus should be requested by the United States, should be kept by a civil officer of the United States, accompanied by a Colombia civil officer, who should ask the proper authorities, if necessary, for the assistance of the national or State forces, in order to secure the due detention and transportation of the prisoner.

Moore on Extradition, I. 718-718; For. Rel. 1878, 151-155; For. Rel. 1879, 251-254, 271, 273-277, 284; For. Rel. 1880, 319, 322.

In January 1865 Mr. Seward complained that the governor of Panama had lately refused Admiral Pearson permission to send across the Isthmus for embarkation at Aspinwall for New York "the insurgent conspirators who had been arrested at the former place with authority and instructions found upon them to seize United States mail steamers on the Pacific." (Mr. Seward, Sec. of State, to Gen. Sickles, Jan. 6, 1865, MS. Inst. Special Missions, II. 29. See *supra*, § 248.)

(7) TELEGRAPHIC COMMUNICATION.

§ 350.

In January 1886 complaint was made by the Central and South American Telegraph Company of New York that the operations of the French Panama Canal Company in the Bay of Panama were endangering the cable of the former company at that point. The matter was brought to the attention of the Colombian minister at Washington, who invoked, by cable, the interposition of his Government.

The French company avowed its control of the land line of telegraph operated in connection with the Panama Railroad Company, and asserted its determination to retain the monopoly alleged to have been derived from the railroad concession, while the railroad company gave notice on its part that the wire was "a private wire" and that messages between Panama and Colon were sent "by courtesy." In this relation the Department of State said: "It is very evident, without resorting to elaborate argument, that if telegraphic facilities are among the means of interoceanic communication covered by the treaty [of 1846], they must be open and public and their free and neutral use fully secured. The announcement that the railroad and canal companies' telegraph line from Colon to Panama is a *private* wire, and that the use of it by the Governments of the United States and Colombia and by the commercial public is permissive only, is, if true,



abundant demonstration that no trans-isthmian telegraphic communication now exists such as was contemplated and falls under the necessary guaranties of the treaty of 1846. That instrument guaranties to us 'equal, tranquil, and constant use' of whatever means of transit are provided for 'correspondence,' and the telegraph is assuredly the most important and useful of all such means."

Mr. Bayard, Sec. of State, to Mr. Maury, min. to Colombia, Feb. 25, 1887, For. Rel. 1888, I. 405.

As to the complaint made by the Central and South American Telegraph Company, see Mr. Bayard, Sec. of State, to Mr. Becerra, Colombian min., Jan. 23, 1886, MS. Notes to Colombia, VII. 77; Mr. Bayard, Sec. of State, to Mr. Scrymser, President of Central and South American Telegraph Co., Feb. 6, 1886, 158 MS. Dom. Let. 669.

With regard to the monopoly claimed by the Panama Railroad Company of the telegraph line across the Isthmus, the Colombian minister of foreign affairs, December 28, 1887, stated that his Government, availing itself of the right to construct public works of that kind within its own territory, had resolved to establish in the Department of Panama a national telegraph line of which the United States could have the use, with the assurance that its communications would meet with no obstructions. Satisfaction was expressed by the United States with this announcement. (For. Rel. 1888, I. 407-408.)

### III. CLAYTON-BULWER TREATY.

#### 1. THE TREATY AND ITS ANTECEDENTS.

#### § 351.

April 19, 1850, Mr. John M. Clayton, Secretary of State, and Sir Henry Lytton Bulwer, British minister at Washington, signed at that capital a treaty, the object of which was in the preamble declared to be to set forth and fix in a convention the "views and intentions" of the contracting parties "with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans by the way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."

By Article I. of the treaty it was provided as follows:

"The Governments of the United States and Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or people for the purpose of erecting or maintaining any such fortifica-

tions, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection, or influence that either may possess, with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

By Article II. it was agreed that American or British vessels traversing the canal should, in case of war between the contracting parties, be exempt from blockade, detention or capture by either of the belligerents, and that this provision should extend to such a distance from the ends of the canal as it might be found convenient to establish.

In order to assure the construction of the canal, the contracting parties (Art. III.) engaged that, if it should be undertaken upon fair and equitable terms, by persons having the authority of the local governments through whose territory it might pass, they would protect such persons and their property from the commencement to the completion of the canal "from unjust detention, confiscation, seizure, or any violence whatsoever."

It was also provided (Art. IV.) that the contracting parties should use (1) their influence with the local governments to induce them to facilitate the construction of the canal, and (2) their good offices to procure the establishment of two free ports, one at each end of the canal.

The contracting parties further engaged (Art. V.), when the inter-oceanic canal was completed, to "protect it from interruption, seizure, or unjust confiscation," and to "guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure." It was, however, expressly understood that the guarantee of protection and security was given conditionally and might be withdrawn by both governments or either government, if both or either of them should consider that the persons or company undertaking or managing the canal had established regulations concerning traffic contrary to the spirit and intention of the convention, either by making unfair discriminations or by imposing oppressive exactions or unreasonable tolls.

By Article VI. of the treaty the contracting parties entered into the following engagements:

"The contracting parties in this convention engage to invite every State with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honor

and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated. And the contracting parties likewise agree that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any differences arise as to right or property over the territory through which the said canal shall pass, between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of the United States and Great Britain will use their good offices to settle such differences in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties."

By Article VII. it was agreed that the Governments of the United States and Great Britain should give their support and encouragement to such persons or company as might first offer to begin the canal with the necessary concessions and capital, and that if any persons or company should already have entered into a proper and unobjectionable contract with any state through which the proposed ship canal might pass, and had made preparations and expenditures on the faith of such contract, such persons or company should have prior consideration and should be allowed a year from the date of the exchange of the ratifications of the treaty for the purpose of concluding their arrangements and presenting proofs of the necessary subscriptions of capital.

The contracting parties then embodied in Article VIII. of the treaty a general stipulation, in the following terms:

"The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than

the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

The treaty was approved by the Senate of the United States by a vote of 42 to 11, the latter number including the vote of Senator Douglas, who, though he was not recorded at the time, afterwards stated that he voted against the treaty. With this inclusion, the vote stood:

**Yeas**—Messrs. Badger, Baldwin, Bell, Berrien, Butler, Cass, Chase, Clarke, Clay, Cooper, Corwin, Davis of Massachusetts, Dawson, Dayton, Dodge of Wisconsin, Dodge of Iowa, Downs, Felch, Foote, Greene, Hale, Houston, Hunter, Jones, King, Mangum, Mason, Miller, Morton, Norris, Pearce, Pratt, Sebastian, Seward, Shields, Smith, Soulé, Spruance, Sturgeon, Underwood, Wales, and Webster—42.

**Nays**—Messrs. Atchison, Borland, Bright, Clemens, Davis of Mississippi, Dickinson, Douglas, Turney, Walker, Whitcomb, and Yulee—11. (Ex. Journal, VIII. 186.)

**June 3, 1848**, Mr. Elijah Hise, newly appointed chargé d'affaires to Guatemala and Central America, was instructed by Mr. Buchanan to obtain information as to the nature and extent of the late British encroachments in Central America, particularly in the Mosquito territory and Belize, in order that the United States might decide upon a course of policy. It was then reported that Great Britain had obtained possession of the harbor of San Juan de Nicaragua, or Greytown, with a view to obtain control of the route for a railroad or a canal between the Atlantic and Pacific oceans by way of Lake Nicaragua. Mr. Hise was prevented by illness and other causes from reaching Guatemala till a late period in Mr. Polk's administration, and before any dispatches were received from him Mr. Polk had ceased to be President. (H. Ex. Doc. 75, 31 Cong. 1 sess. 92-96; Curtis, *Life of Buchanan*, I. 620-623.)

For an elaborate discussion of the Central American question, see Mr. Clayton, Sec. of State, to Mr. Hise, May 1, 1849, MS. Inst. Am. States, XV. 64.

**June 21, 1849**, Mr. Hise, acting without instructions, concluded with Mr. Selva, representing the Government of Nicaragua, a special convention by which the latter granted to "the United States of America, or to a company of the citizens thereof, the exclusive right and privilege" of constructing a canal, railway, or other means of communication between the two oceans through the territories of Nicaragua. If the United States should decide not to undertake the work itself, then "either the President or Congress" was to grant a charter to a company for the purpose. The United States was to have the right to fortify and protect by its forces the line to be established. Public vessels or private vessels of countries with which the contracting parties might be at war were not, during the continuance of the war, to be allowed to use the canal. Nicaragua agreed to grant to the United States, or to a chartered company, land for the establishment of two free cities, one at each end of the proposed way. In return for these concessions, the United States was to protect and defend Nicaragua in the possession and exercise of the sovereignty and dominion of all the territories within her just limits. (40 Brit. & For. St. Pap. 969; Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 94.)

For an unratified treaty of amity and commerce between the United States and Nicaragua, concluded September 3, 1849, containing an Article (XXXV.) in relation to the proposed canal, see 40 Brit. & For. St. Pap. 979, 1052. This treaty was signed by Mr. Squier, American chargé to Guatemala and Central America, and Señor Zepeda, on the part of Nicaragua.

The Hise-Selva convention was not approved either by the United States or by Nicaragua, and was not submitted to the United States Senate. Nor was the treaty of September 3, 1849, so submitted. It was stated that the principal reason for not submitting it to the Senate was the circumstance that a particular company mentioned in Article XXXV., as having been chartered by Nicaragua to construct the canal, desired a modification of the contract. (Mr. Clayton, Sec. of State, to Mr. Carcache, Nicaraguan chargé d'affaires, Jan. 2 and Feb. 5, 1850, MS. Notes to Central America. I. 2, 3. See, also, Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, Jan. 26, 1850, MS. Inst. France, XV. 125.)

The company referred to was styled "The American Atlantic and Pacific Ship Canal Company." Its contract with Nicaragua was signed at Leon, August 27, 1849. This contract, which was afterwards accepted under Article VII. of the Clayton-Bulwer treaty, was annulled by a decree by the President of Nicaragua, February 18, 1856. (Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 195, 250.)

Soon after the receipt of the Hise-Selva convention in Washington, Mr. Clayton, who had then become Secretary of State, acquainted the British minister, Mr. Crampton, with the fact that it was not approved by the United States, and at the same time suggested that great caution would be required on both sides in order to prevent the United States and Great Britain from being brought into collision on account of the Mosquito question. (Mr. Crampton, Brit. min. to Lord Palmerston, Sept. 17, 1849, 40 Brit. & For. St. Pap. 953; Correspondence (1885), 201, where the date is erroneously given as September 15.)

See, also, Mr. Crampton to Lord Palmerston, Oct. 1, and Oct. 15, 1849, 40 Brit. & For. St. Pap. 955-961.

September 24, 1849, Mr. W. C. Rives, minister to France, who, owing to the departure of Mr. Bancroft from London and the temporary postponement of the departure of his successor, Mr. Abbott Lawrence, for that capital, was requested to stop on his way to Paris and confer with the British Government, had an interview with Lord Palmerston, in which he expressed, under instructions from Mr. Clayton, the view that the two governments should come to an understanding with each other on the basis of the free use and neutralization of the canal. (Mr. Rives to Mr. Clayton, Sept. 25, 1849, Correspondence (1885), 11.)

Mr. Lawrence was afterwards instructed in the same sense. (Mr. Clayton, Sec. of State, to Mr. Lawrence, min. to England, Oct. 20, 1849, Correspondence (1885), 13; MS. Inst. Great Britain, XVI. 50. See, also, same to same, Dec. 10, 1849, MS. Inst. Great Britain, XVI. 73.)

With reference to Mr. Rives' conversation with Lord Palmerston, see Lord Palmerston to Mr. Crampton, Nov. 9, 1849, saying that the British Government had "no selfish or exclusive views in regard to a communication by canal or railway across the Isthmus from sea to sea." (40 Brit. & For. St. Pap. 961, 962.)

See, also, Mr. Crampton to Lord Palmerston, Nov. 4, 1849, 40 Brit. & For. State Pap. 966; Mr. Lawrence to Lord Palmerston, Nov. 8, 1849, id.

961; Lord Palmerston to Mr. Lawrence, Nov. 13, 1849. id. 962-964; same to same, Nov. 19, 1849, id. 965; Mr. Lawrence to Lord Palmerston, Nov. 22, 1849, id. 966, 988; same to same, Dec. 14, 1849, id. 989.

September 28, 1849, the Government of Honduras, by an agreement signed with Mr. Squier, the United States chargé d'affaires, ceded to the United States Tigre Island, in the Gulf of Fonseca, to hold absolutely for eighteen months or until the ratification of a treaty which had that day been signed. October 16, 1849, Mr. Chatfield, the British diplomatic representative in Guatemala, with an armed force took possession of the island in the name of her Britannic Majesty. The United States asked for a disavowal of Mr. Chatfield's act. Lord Palmerston stated that Mr. Chatfield had taken possession of the islands as a measure of reprisal and as a temporary pledge for the payment of claims of British subjects against Honduras, but that, when all the circumstances became known, he was directed to restore the island to its former condition. Lord Palmerston added that her Majesty's Government intended to abide by the assurance given to Mr. Lawrence on the 13th of November, that they did not intend to occupy or colonize any part of Central America, but that the arrangement made by Mr. Squier for the cession of Tigre Island to the United States would, if adopted by the latter, be at variance with the declaration contained in Mr. Lawrence's note of the 8th of November, to which that of the 13th was a reply. (40 Brit. & For. St. Pap. 997-1002, 1019.)

See, also, Mr. Clayton, Sec. of State, to Mr. Squier, May 7, 1850, MS. Inst. Am. States, XV. 104; Mr. Seward, Sec. of State, to Mr. Adams, min. to England, April 25, 1866, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 14.

Negotiations at London, with reference to the Central American question and the interoceanic canal, having been delayed by Mr. Lawrence's illness, Sir Henry L. Bulwer, British minister at Washington, who was fully possessed of Lord Palmerston's views, determined without delay to enter into a treaty, and on February 3, 1850, he transmitted to Lord Palmerston a project of the convention afterwards signed. In so doing, he said: "It [the convention] will probably be attacked with violence by the parties who are for supporting Mr. Monroe's famous doctrine at all hazards, and who contend that Mr. Hise's convention is the only one that this country ought to adopt or sanction; but, on the other hand, I think I can promise that it will be duly esteemed and approved of by the Senate, and carry with it the weighty sanction of all reasonable men." (40 Br. & For. State Papers, 1003, 1008, 1010-1011, 1011-1014.)

For Lord Palmerston's reply, see 40 Br. & For. State Papers, 1017, 1018.

As to the signature of the Clayton-Bulwer treaty, see 40 Brit. & For. State Papers, 1024-1027, 1028-1030.

"This convention provides that neither party to it shall make use of any protection or alliance for the purpose of occupying, fortifying, colonizing or assuming or exercising any dominion whatsoever over any part of Central America or the Mosquito coast. Virtually it makes provision also for the protection of the company which already has the charter from Nicaragua and which is protected by Squier's treaty, as well as for the future protection of the Tehuantepec and Panama routes, and all other practicable routes across the Isthmus. It prohibits the blockade of vessels traversing the canal; it liberates all Central America from foreign aggression; and it will, in short, when known, be hailed as a declaration of Central American independence. The convention is now

before the Senate, which will no doubt consent to its ratification, when a copy of it will be transmitted to you, in order that, at the proper time, you may invite the French Government to enter into the treaty of accession for which the convention provides." (Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, April 27, 1850, MS. Inst. France. XV. 129.)

Subsequently, after the treaty was approved by the Senate, but before the ratifications were exchanged, Mr. Rives was instructed to "lose no time in bringing this subject to the notice of the Minister of Foreign Affairs of France, and negotiating with the French Government a convention in the very words, as far as the same are applicable, of the one concluded between the United States and Great Britain." (Mr. Clayton, Sec. of State, to Mr. Rives, min. to France, May 26, 1850, MS. Inst. France, XV. 131.)

For Mr. Clayton's defense of the treaty in the Senate, March 8 and 9, 1853, see Cong. Globe, 32 Cong. 3 sess., App. 247.

See speech of Mr. Seward in the Senate, Jan. 31, 1856, Cong. Globe, 34 Cong. 1 sess. pt. I. 323; App. 75.

For an interesting article on the Clayton-Bulwer treaty, see 99 Quarterly Rev. (June, 1856), 235. This article is attributed by Mr. Hayward (Letters, etc., I. 1290) to Sir E. L. Bulwer. See, also, an article by Sir H. Bulwer (Lord Dalling), 104 Edinburgh Rev. (July, 1856), 280.

"You will represent to the Government of Nicaragua that this Government cannot undertake to guarantee the sovereignty of the line of the (proposed) canal to her until the course which that work shall take, with reference to the river San Juan, and its terminus on the Pacific, shall be ascertained, and until the difference between Nicaragua and Costa Rica, concerning their boundary, shall be settled." (Mr. Webster, Sec. of State, to Mr. Kerr, May 4, 1851, MS. Inst. Am. St. FV. 113.)

## 2. VARIANT INTERPRETATIONS.

When the Clayton-Bulwer treaty was made, Great Britain claimed dominion over the British settlement at Belize, otherwise known as British Honduras, and, as a dependency thereof, over Ruatan and certain other islands, otherwise known as the Bay Islands, lying off the coast of the Republic of Honduras; and she also asserted a protectorate over the coast or territory inhabited by the Mosquito Indians.

See Keasbey, The Nicaragua Canal and the Monroe Doctrine, 164-175.  
Travis, The History of the Clayton-Bulwer treaty, 31-50.

### (1) BELIZE, OR BRITISH HONDURAS.

#### § 352.

*Declaration made by Sir Henry Bulwer at the Department of State, June 29, 1850, prior to the exchange of the ratifications of the Clayton-Bulwer treaty.*

"In proceeding to the exchange of the ratifications of the convention signed at Washington on the 19th of April, 1850, between her Britannic majesty and the United States of America, relative to the establishment of a communication by ship canal between the Atlantic and Pacific oceans, the undersigned, her Britannic majesty's plenipotentiary, has the honor to declare that the Government of Great Britain is fully satisfied with the provisions of the said convention, and that it is ready to ratify the same."

potentiary, has received her majesty's instructions to declare that her majesty does not understand the engagements of that convention to apply to her majesty's settlement at Honduras, or to its dependencies. Her majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned.

"Done at Washington the 29th day of June, 1850.

"H. L. BULWER."

*Memorandum touching Sir Henry Bulwer's declaration filed by Mr. Clayton in the Department of State at Washington, July 5, 1850.*

"DEPARTMENT OF STATE,

*Washington, July 5, 1850.*

"The within declaration of Sir H. L. Bulwer was received by me on the 29th day of June, 1850. In reply, I wrote him my note of the 4th of July, acknowledging that I understood British Honduras was not embraced in the treaty of the 19th day of April last; but at the same time carefully declining to affirm or deny the British title in their settlement or its alleged dependencies. After signing my note last night, I delivered it to Sir Henry, and we immediately proceeded, without any further or other action, to exchange the ratifications of said treaty. The blank in the declaration was never filled up. The consent of the Senate to the declaration was not required, and the treaty was ratified as it stood when it was made.

"JOHN M. CLAYTON.

"N. B.—The rights of no Central American State have been compromised by the treaty or by any part of the negotiations."

For the text of Mr. Clayton's note to Sir H. L. Bulwer of July 4, 1850, see H. Ex. Doc. 1, 34 Cong. 1 sess. 119. The essential part of the note is quoted below, in Lord Clarendon's statement for Mr. Buchanan of May 2, 1854.

When the declaration of Sir H. Bulwer, and the reply of Mr. Clayton, of July 4, 1850, on the exchange of the ratifications of the treaty, were communicated with other papers to the Senate, a discussion took place, in which Mr. Cass bore the leading part. Mr. Cass denied the authority of Mr. King to speak for him, and offered a resolution instructing the Committee on Foreign Relations to inquire and report what measures, if any, should be taken by the Senate in regard to the correspondence. The committee reported that no measures were, in its opinion, necessary, and none were taken. (S. Rep. 407, 32 Cong. 2 sess.)

See speech of Gen. Cass in the Senate, Jan. 11, 1854, Cong. Globe, 33 Cong. 1 sess., App., given in Smith's Life of Cass, 750.

For Mr. Clayton's speech in the Senate, March 8 and 9, 1853, in which it is maintained that Belize, or British Honduras, within its proper limits, originally constituted a part of Yucatan, and not of Central America, see Cong. Globe, 32 Cong. 3 sess., App. 247.

"It is believed that Great Britain has a qualified right over a tract of country called the Belize, from which she is not ousted by this



treaty, because no part of that tract, when restricted to its proper limits, is within the boundaries of Central America."

Mr. Marcy, Sec. of State, to Mr. Borland, min. to Central America, Dec. 30, 1853, Correspondence in Relation to the Proposed Interoceanic Canal (Washington, 1885), 247.

"It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies.

"It was not necessary that this should have been particularly stated, inasmuch as it is generally considered that the term 'Central America'—a term of modern invention—could only appropriately apply to those States at one time united under the name of the 'Central American Republic,' and now existing as five separate republics; but, in order that there should be no possible misconception at any future period relative to this point, the two negotiators, at the time of ratifying the treaty, exchanged declarations to the effect that neither of the Governments they represented had meant in such treaty to comprehend the settlement and dependencies in question.

"Mr. Clayton's declaration to Her Majesty's Government on this subject was ample and satisfactory, as the following extract from his note of July 4, 1850, will show:

"The language of Article I. of the convention concluded on the 19th day of April last, between the United States and Great Britain, describing the country not to be occupied, &c., by either of the parties, was, as you know, twice approved by the Government, and it was neither understood by them, nor by either of us [the negotiators], to include the British settlement in Honduras (commonly called British Honduras, as distinct from the State of Honduras), nor the small islands in the neighborhood of that settlement which may be known as its dependencies.

"To this Settlement and these islands the treaty we negotiated was not intended by either of us to apply. The title to them it is now, and has been my intention throughout the whole negotiation, to leave as the treaty leaves it, without denying or affirming, or in any way meddling with the same, just as it stood previously.

"The chairman of the Committee on Foreign Relations of the Senate, the Honorable W. R. King, informs me that the Senate perfectly understood that the treaty did not include British Honduras."

"Such having been the mutual understanding as to the exception of the settlement of Belize and its dependencies from the operation of the treaty, the only question relative to this settlement and its dependencies in reference to the treaty, that can now arise, is as to what is the settlement of Belize and its dependencies, or, in other words, as to what is British Honduras and its dependencies.

“Her Majesty’s Government certainly understood that the settlement of Belize, as here alluded to, is the settlement of Belize as established in 1850; and it is more warranted in this conclusion from the fact that the United States had, in 1847, sent a consul to this settlement, which consul had received his exequatur from the British Government; a circumstance which constitutes a recognition by the United States Government of the settlement of British Honduras under Her Majesty as it then existed.

“Her Majesty’s Government at once states this, because it perceives that Mr. Buchanan restricts the said settlement within the boundaries to which it was confined by the treaty of 1786; whilst Her Majesty’s Government not only has to repeat that the treaties with Old Spain cannot be held, as a matter of course, to be binding with respect to all the various detached portions of the old Spanish-American monarchy, but it has also to observe that the treaty of 1786 was put an end to by a subsequent state of war between Great Britain and Spain; that during that war the boundaries of the British settlement in question were enlarged; and that when peace was re-established between Great Britain and Spain, no treaty of a political nature, or relating to territorial limits, revived those treaties between Great Britain and Spain which had previously existed.

“Her Majesty’s Government, in stating this fact, declares distinctly, at the same time, that it has no projects of political ambition or aggrandizement with respect to the settlement referred to; and that it will be its object to come to some prompt, fair, and amicable arrangement with the states in the vicinity of British Honduras for regulating the limits which should be given to it, and which shall not henceforth be extended beyond the boundaries now assigned to them.”

Statement of Lord Clarendon for Mr. Buchanan, May 2, 1854, 46 Br. & For. State Papers, 267; H. Ex. Doc. 1, 34 Cong. 1 sess. 89.

“In regard to Belize proper, confined within its legitimate boundaries, under the treaties of 1783 and 1786, and limited to the usufruct specified in these treaties, it is necessary to say but a few words. The Government of the United States will not, for the present, insist upon the withdrawal of Great Britain from this settlement, provided all the other questions between the two Governments concerning Central America can be amicably adjusted. It has been influenced to pursue this course, partly by the declaration of Mr. Clayton, of the 4th of July, 1850, but mainly in consequence of the extension of the license granted by Mexico to Great Britain under the treaty of 1826, which that Republic has yet taken no steps to terminate.

“It is, however, distinctly to be understood that the Government of the United States acknowledge no claim of Great Britain within Belize, except the temporary ‘liberty of making use of the wood of the different kinds, the fruits and other produce in their natural state,’ fully

recognizing that the former Spanish sovereignty over the country belongs either to Guatemala or to Mexico.

"In conclusion, the Government of the United States most cordially and earnestly unite in the desire expressed by 'Her Majesty's Government, not only to maintain the convention of 1850 intact, but to consolidate and strengthen it by strengthening and consolidating the friendly relations which it was calculated to cement and perpetuate.' Under these mutual feelings it is deeply to be regretted that the two Governments entertain opinions so widely different in regard to its true effect and meaning."

Remarks of Mr. Buchanan, min. to England, July 22, 1854, in reply to Earl of Clarendon, 46 Br. & For. State Papers, 295; H. Ex. Doc. 1, 34 Cong. 1 sess. 113.

See Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, June 12, Aug. 6, 1855, H. Ex. Doc. 1, 34 Cong. 1 sess. 67, 69; and President Pierce's annual message of Dec. 31, 1855, id.

Great Britain had not, at the time of the convention of April 19, 1850, "any rightful possessions in Central America, save only the usufructuary settlement at the Belize, if that really be in Central America;" and at the same time, "if she had any, she was bound by the express tenor and true construction of the convention, to evacuate the same, so as thus to stand on precisely the same footing in that respect as the United States."

Mr. Marcy, Sec. of State, to Mr. Dallas, min. to England, July 26, 1856, MS. Inst. Gr. Brit. XVII. 1, 10. The whole of this instruction is of great importance.

See, also, Mr. Marcy to Mr. Dallas, March 14, April 7, May 24, 1856, MS. Inst. Gr. Br. XVI. 468, 471, 480.

See S. Ex. Docs. 12, and 27, 32 Cong. 2 sess.; S. Ex. Doc. 1, 34 Cong. 1 sess.

## (2) RUATAN, AND OTHER BAY ISLANDS.

### § 353.

#### "PROCLAMATION.

#### "OFFICE OF THE COLONIAL SECRETARY,

*"Belize, July 17, 1852.*

"This is to give notice that Her Most Gracious Majesty the Queen has been pleased to constitute and make the islands of Roatan [Ruatan], Bonacca, Utilla, Barbarat, Helene, and Morat to be a colony to be known and designated as 'the Colony of the Bay Islands.'"

"AUGUSTUS FREDERICK GORE,

*"Acting Colonial Secretary.*

"God save the Queen!"

Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 245.

"I believe Great Britain has never defined the character of her claim to possess what is called 'the colony of the Bay Islands.' It does not appear to be one of her organized colonies. She has not, in explicit language, claimed sovereignty over it, though her acts have indicated such a purpose. Whatever may have been her rights or pretension to rights over this colony, they were all given up, according to the view here taken of the subject, by the Clayton and Bulwer treaty. . . .

"It is presumed that the only part of that colony to which England will be disposed to attach much value, or have any inducement to retain, is the island of Ruatan. From an intimation made to me it may be that she will take the position that this island does not belong to any of the Central American States, but is to be regarded in the same condition as one of the West India Islands. By reference to the treaties between Great Britain and Spain, you will find this island clearly recognized as a Spanish possession, and a part of the old vice-royalty of Guatemala."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, Sept. 12, 1853, H. Ex. Doc. 1, 34 Cong. 1 sess. 49, 50.

"The island of Ruatan, belonging to the State of Honduras, and within sight of its shores, was captured, in 1841, by Colonel McDonald, then Her Britannic Majesty's Superintendent at Belize, and the flag of Honduras was hauled down, and that of Great Britain was hoisted in its place. This small State, incapable of making any effectual resistance, was compelled to submit, and the island has ever since been under British control. What makes this event more remarkable is, that it is believed a similar act of violence had been committed on Ruatan by the Superintendent of Belize in 1835; but on complaint by the Federal Government of the Central American States then still in existence, the act was formally disavowed by the British Government, and the island was restored to the authorities of the Republic.

"No question can exist but that Ruatan was one of the 'islands adjacent' to the American continent which had been restored by Great Britain to Spain under the treaties of 1783 and 1786. Indeed, the most approved British gazetteers and geographers, up till the present date, have borne testimony to this fact, apparently without information from that hitherto but little known portion of the world, that the island had again been seized by Her Majesty's Superintendent at Belize, and was now a possession claimed by Great Britain."

Statement of Mr. Buchanan, min. to England, to the Earl of Clarendon, Jan. 6, 1854, 46 Br. & For. State Papers, 244, 251; H. Ex. Doc. 1, 34 Cong. 1 sess. 55, 57, 61.

In a statement, dated May 2, 1854, in reply to Mr. Buchanan's statement, Lord Clarendon said that the only question that could be debatable with regard to the Bay Islands was, whether they were dependencies of Belize or of some Central American state. It was true, he said, that the Republic of Central America declared that it had had a flag flying

on the Island of Ruatan from 1821 to 1839, but all that was positively known was that, when the British Government learned that a foreign flag was flying there, a British man-of-war was sent to haul it down, and no attempt had since been made to reestablish it. He also declared that whenever Ruatan had been permanently occupied, either in remote or recent times, by anything more than a military guard or flagstaff, the occupation had been by British subjects. (46 Brit. & For. State Pap. 268; H. Ex. Doc. 1, 34 Cong. 1 sess. 90.)

For "Remarks" of Mr. Buchanan, July 22, 1854, in answer to Lord Clarendon, see 46 Brit. & For. State Pap. 272; H. Ex. Doc. 1, 34 Cong. 1 sess. 93.

For an additional article signed at London, Aug. 27, 1856, to the treaty of amity and commerce between Great Britain and Honduras, see Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 252.

"Whilst it is greatly to the interest, as I am convinced it is the sincere desire, of the Governments and people of the two countries to be on terms of intimate friendship with each other, it has been our misfortune almost always to have had some irritating, if not dangerous, outstanding question with Great Britain.

"Since the origin of the Government we have been employed in negotiating treaties with that power, and afterwards in discussing their true intent and meaning. In this respect the convention of April 19, 1850, commonly called the Clayton and Bulwer treaty, has been the most unfortunate of all, because the two Governments place directly opposite and contradictory constructions upon its first and most important article. Whilst in the United States we believed that this treaty would place both powers upon an exact equality by the stipulation that neither will ever 'occupy, or fortify, or colonize, or assume, or exercise any dominion' over any part of Central America, it is contended by the British Government that the true construction of this language has left them in the rightful possession of all that portion of Central America which was in their occupancy at the date of the treaty; in fact, that the treaty is a virtual recognition on the part of the United States of the right of Great Britain, either as owner or protector, to the whole extensive coast of Central America, sweeping round from the Rio Hondo to the port and harbor of San Juan de Nicaragua, together with the adjacent Bay Islands, except the comparatively small portion of this between the Sarstoon and Cape Honduras. According to their construction, the treaty does no more than simply prohibit them from extending their possessions in Central America beyond the present limits. It is not too much to assert that if in the United States the treaty had been considered susceptible of such a construction it never would have been negotiated under the authority of the President, nor would it have received the approbation of the Senate. The universal conviction in the United States was that when our Government consented to violate its traditional and time-honored policy and to stipulate with a foreign government never to occupy or

acquire territory in the Central American portion of our own continent, the consideration for this sacrifice was that Great Britain should, in this respect at least, be placed in the same position with ourselves. Whilst we have no right to doubt the sincerity of the British Government in their construction of the treaty, it is at the same time my deliberate conviction that this construction is in opposition both to its letter and its spirit.

“Under the late Administration negotiations were instituted between the two Governments for the purpose, if possible, of removing these difficulties, and a treaty having this laudable object in view was signed at London on the 17th October, 1856, and was submitted by the President to the Senate on the following 10th of December. Whether this treaty, either in its original or amended form, would have accomplished the object intended without giving birth to new and embarrassing complications between the two Governments, may perhaps be well questioned. Certain it is, however, it was rendered much less objectionable by the different amendments made to it by the Senate. The treaty as amended was ratified by me on the 12th March, 1857, and was transmitted to London for ratification by the British Government. That Government expressed its willingness to concur in all the amendments made by the Senate with the single exception of the clause relating to Ruatan and the other islands in the Bay of Honduras. The article in the original treaty as submitted to the Senate, after reciting that these islands and their inhabitants ‘having been, by a convention bearing date the 27th day of August, 1856, between Her Britannic Majesty and the Republic of Honduras, constituted and declared a free territory under the sovereignty of the said Republic of Honduras,’ stipulated that ‘the two contracting parties do hereby mutually engage to recognize and respect in all future time the independence and rights of the said free territory as a part of the Republic of Honduras.’

“Upon an examination of this convention between Great Britain and Honduras of the 27th August, 1856, it was found that whilst declaring the Bay Islands to be ‘a free territory under the sovereignty of the Republic of Honduras’ it deprived that Republic of rights without which its sovereignty over them could scarcely be said to exist. It divided them from the remainder of Honduras and gave to their inhabitants a separate government of their own, with legislative, executive, and judicial officers, elected by themselves. It deprived the Government of Honduras of the taxing power in every form and exempted the people of the islands from the performance of military duty except for their own exclusive defense. It also prohibited that Republic from erecting fortifications upon them for their protection, thus leaving them open to invasion from any quarter; and, finally, it provided ‘that slavery shall not at any time hereafter be permitted to exist therein.’

"Had Honduras ratified this convention, she would have ratified the establishment of a state substantially independent within her own limits, and a state at all times subject to British influence and control. Moreover, had the United States ratified the treaty with Great Britain in its original form, we should have been bound 'to recognize and respect in all future time' these stipulations to the prejudice of Honduras. Being in direct opposition to the spirit and meaning of the Clayton and Bulwer treaty as understood in the United States, the Senate rejected the entire clause, and substituted in its stead a simple recognition of the sovereign right of Honduras to these islands in the following language: 'The two contracting parties do hereby mutually engage to recognize and respect the islands of Ruatan, Bonaco, Utila, Barbaretta, Helena, and Morat, situate in the Bay of Honduras and off the coast of the Republic of Honduras, as under the sovereignty and as part of the said Republic of Honduras.'

"Great Britain rejected this amendment, assigning as the only reason that the ratifications of the convention of the 27th August, 1856, between her and Honduras had not been 'exchanged, owing to the hesitation of that Government.' Had this been done, it is stated that 'Her Majesty's Government would have had little difficulty in agreeing to the modification proposed by the Senate, which then would have had in effect the same signification as the original wording.' Whether this would have been the effect, whether the mere circumstance of the exchange of the ratifications of the British convention with Honduras prior in point of time to the ratification of our treaty with Great Britain would 'in effect' have had 'the same signification as the original wording,' and thus have nullified the amendment of the Senate, may well be doubted. It is, perhaps, fortunate that the question has never arisen.

"The British Government, immediately after rejecting the treaty as amended, proposed to enter into a new treaty with the United States, similar in all respects to the treaty which they had just refused to ratify, if the United States would consent to add to the Senate's clear and unqualified recognition of the sovereignty of Honduras over the Bay Islands the following conditional stipulation: 'Whenever and so soon as the Republic of Honduras shall have concluded and ratified a treaty with Great Britain by which Great Britain shall have ceded and the Republic of Honduras shall have accepted the said islands, subject to the provisions and conditions contained in such treaty.'

"This proposition was, of course, rejected. After the Senate had refused to recognize the British convention with Honduras of the 27th August, 1856, with full knowledge of its contents, it was impossible for me, necessarily ignorant of 'the provisions and conditions' which might be contained in a future convention between the same parties, to sanction them in advance.

"The fact is that when two nations like Great Britain and the United States, mutually desirous, as they are, and I trust ever may be, of maintaining the most friendly relations with each other, have unfortunately concluded a treaty which they understand in senses directly opposite, the wisest course is to abrogate such a treaty by mutual consent and to commence anew. Had this been done promptly, all difficulties in Central America would most probably ere this have been adjusted to the satisfaction of both parties. The time spent in discussing the meaning of the Clayton and Bulwer treaty would have been devoted to this praiseworthy purpose, and the task would have been the more easily accomplished because the interest of the two countries in Central America is identical, being confined to securing safe transits over all the routes across the Isthmus."

President Buchanan, annual message, Dec. 8, 1857. (Richardson's Messages and Papers, V. 441.)

For the text of the convention between Great Britain and Honduras, signed Aug. 27, 1856, as above stated, see Blue Book, Cor. respecting Cent. Am. 1856-1860 (presented to Parliament, 1860), 6.

For the text of the Dallas-Clarendon convention, of Oct. 17, 1856, see the same Blue Book, p. 24.

See Mr. Cass, Sec. of State, to Lord Napier, Brit. min., April 6, 1858, Cor. in relation to the Proposed Inter-oceanic Canal (Washington, 1885), 109.

(3) MOSQUITO PROTECTORATE.

§ 354.

"Under the assumed title of protector of the kingdom of the Mosquitos—a miserable, degraded, and insignificant tribe of Indians—she doubtless intends to acquire an absolute dominion over this vast extent of sea-coast.

Mr. Buchanan's instructions to Mr. Hise.

With what little reason she advances this pretension appears from the convention between Great Britain and Spain, signed at London on the 14th day of July, 1786. By its first article, 'His Britannic Majesty's subjects, and the other colonists who have hitherto enjoyed the protection of England, shall evacuate the country of the Mosquitos, as well as the continent in general and the islands adjacent, without exception, situated beyond the line hereafter described as what ought to be the frontier of the extent of the territory granted by His Catholic Majesty to the English for the uses specified in the third article of the present convention, and in addition to the country already granted to them in virtue of the stipulations agreed upon by the commissioners of the two crowns in 1783.' "

Mr. Buchanan, Sec. of State, to Mr. Hise, June 3, 1848, 1 Curtis' Buchanan, 622.

For the text of the London convention of July 14, 1786, see Correspondence in relation to the Proposed Inter-oceanic Canal (Washington, 1885), 171, 172. See, also, at the same place, Art. VI. of the treaty of peace between Great Britain and Spain, signed Sept. 3, 1783.



“The President has read with great concern those parts of your despatches which speak of your intercourse with Mr. Castellon, the representative of Nicaragua at London.

Action of Mr. Clayton.

The Department has taken into serious consideration the question respecting the Mosquito shore, and intends giving Mr. Squier, the newly appointed chargé d'affaires to Guatemala, full instructions upon the subject. Instructions in regard to it will likewise be sent to you, probably by the next steamer. Meanwhile you are authorized to assure Mr. Castellon that the President has determined to accede to the request of the Government of Nicaragua, by interposing his good offices for the purpose of endeavoring to induce the British Government to desist from its pretensions to that territory. You will also advise him to continue firm in asserting the rights of his Government, and not to do any act which might either weaken or alienate those rights.”

Mr. Clayton, Sec. of State, to Mr. Bancroft, min. to England, April 30, 1849, MS. Inst. Great Britain, XV. 385.

“This application has led to an inquiry by the Department into the claim set up by the British Government, nominally in behalf of His Mosquito Majesty, and the conclusion arrived at is that it has no reasonable foundation. Under this conviction, the President can never allow such pretension to stand in the way of any rights or interests which this Government or citizens of the United States now possess, or may hereafter acquire, having relation to the Mosquito shore, and especially to the port and river of San Juan de Nicaragua. He is decided in the opinion that that part of the American continent having been discovered by Spain and occupied by her so far as she deemed compatible with her interests, of right belonged to her; that the alleged independence of the Mosquito Indians, though tolerated by Spain, did not extinguish her right of dominion over the region claimed in their behalf, any more than similar independence of other Indian tribes did or may now impair the sovereignty of other nations, including Great Britain herself, over many tracts of the same continent; that the rights of Spain to that region have been repeatedly acknowledged by Great Britain in solemn public treaties with that power; that all those territorial rights in her former American possessions descended to the states which were formed out of those possessions, and must be regarded as still appertaining to them in every case where they may not have been voluntarily relinquished or canceled by conquest followed by adverse possession.”

Mr. Clayton, Sec. of State, to Mr. Bancroft, min. to England, May 2, 1849, MS. Inst. Gr. Brit. XV. 386.

“It is understood that New Granada sets up a claim to the Mosquito shore, based upon the transfer of the military jurisdiction there to the authorities at Carthagena and Bogotá, pursuant to the royal order of

His Catholic Majesty of the 30th November, 1803, and upon the 7th article of the treaty between Colombia and Central America, by which those Republics engaged to respect their limits based upon the *uti possidetis* of 1810. Great Britain also claims that coast in behalf of the pretended king of the Mosquitos, and Nicaragua claims it as heir to the late confederation of Central America. With the conflicting claims of New Granada and Nicaragua we have no concern, and, indeed, there is reason to believe that they will be amicably adjusted. We entertain no doubt, however, that the title of Spain to the Mosquito shore was just, and that her rights have descended to her late colonies adjacent thereto. The Department has not hesitated to express this opinion in the instructions to Mr. Squier, the United States chargé d'affaires to Guatemala, and Mr. Bancroft has been instructed to make it known to the British Government also. You may acquaint the minister for foreign affairs of New Granada with our views on this subject, and may assure him that all the moral means in our power will be exerted to resist the adverse pretensions of Great Britain to that region."

Mr. Clayton, Sec. of State, to Mr. Foote, min. to New Granada, July 19, 1849, MS. Inst. Colombia, XV. 121.

For an elaborate discussion of the subject, see Mr. Clayton, Sec. of State, to Mr. Squier, May 1, 1849, MS. Inst. Am. States, XV. 64.

"I trust that means will speedily be adopted by Great Britain to extinguish the Indian title with the help of the Nicaraguans or the company, within what we consider to be the limits of Nicaragua. We have never acknowledged and never can acknowledge the existence of any claim of sovereignty in the Mosquito king or any other Indian in America. To do so would be to deny the title of the United States to our own territory. Having always regarded an Indian title as a mere right of occupancy, we can never agree that such a title should be treated otherwise than as a thing to be extinguished at the will of the discoverer of the country. Upon the ratification of the treaty, Great Britain will no longer have any interest to deny this principle, which she has recognized in every other case in common with us. 'Stat nominis umbra,' for she can neither occupy, fortify, or colonize, nor exercise dominion or control, in any part of the Mosquito coast or Central America. To attempt to do either of these things after the exchange of ratifications, would inevitably produce a rupture with the United States. By the terms of the treaty neither party can occupy to protect, nor protect to occupy."

Mr. Clayton, Sec. of State, to Mr. Squier, chargé d'affaires to Cent. Am., May 7, 1850, MS. Inst. Am. States, XV. 104.

April 19, 1850, the day on which the Clayton-Bulwer treaty was signed, Mr. Abbott Lawrence, American minister in London, sent to Mr. Clayton an extended report of the results of his investigations of the Mosquito question. With reference to this question, Mr. Bancroft Davis, in his

notes to the treaties of the United States, says: "It was supposed that the most practicable route for a ship-canal was through the State of Nicaragua, by way of the San Juan River and the lakes through which it passes. The eastern coast of Nicaragua was occupied by a tribe called the Mosquito Indians, and Lord Palmerston officially informed Abbott Lawrence, the American minister at London, on the 18th of November, 1849, that 'a close political connection had existed between the Crown of Great Britain and the State and Territory of Mosquito for a period of about two centuries.' This connection was asserted to have been founded on an alleged submission by the Mosquito King to the governor of Jamaica. The investigations made under Lawrence's directions enabled the United States not only to deny that, by public law, Indians could transfer sovereignty in the manner alleged, but also to show by contemporary evidence that no such transfer had been made. He quoted Sir Hans Sloane's account of the matter: 'One King Jeremy came from the Mosquitoes (an Indian people near the provinces of *Nicaragua*, *Honduras*, and *Costa Rica*); he pretended to be a king there, and came from the others of his country to beg of the Duke of Albemarle, governor of Jamaica, his *protection*, and that he would send a governor thither with a power to war on the *Spaniards* and pirates. This he alleged to be due to his country from the Crown of *England*, who had in the reign of King *Charles I* submitted itself to him. The Duke of *Albemarle* did nothing in this matter.' And from another publication, reprinted in Churchill's *Voyages*, Lawrence was able to give an account of the original alleged submission in the time of Charles I: 'He, the King, says that his father, Oldman, King of the Mosquito men, was carried over to England soon after the conquest of Jamaica, and there received from his brother King a crown and commission, which the present old *Jeremy* still keeps safely by him, which is but a cocked hat and a ridiculous piece of writing that he should kindly use and release such straggling Englishmen as should choose to come that way, with plantains, fish, turtle, etc.' " (Treaty vol. 1776-1887, p. 1332.)

A long extract from Mr. Lawrence's dispatch is given in Correspondence in relation to the Proposed Interoceanic Canal (1885), 214.

As to the firing on the American steamer *Prometheus* by the British brig-of-war *Express*, at Greytown, in November 1851, and Lord Granville's disavowal of the act, see message of President Fillmore to the Senate, Dec. 15, 1851, S. Ex. Doc. 6, 32 Cong. 1 sess.; 41 Br. & For. State Papers, 759.

"The Port of San Juan de Nicaragua, or Greytown, being, as you are aware, the terminus on the Atlantic, of the line of transit which has been for some time past in operation between New York and San Francisco, is frequently thronged with passengers between those places. It has, also, received of late, a considerable increase of settlers, many if not most of whom are citizens of the United States. Offences against property and persons must necessarily be of frequent occurrence in that place, and their frequency and enormity are likely to increase in proportion to the absence of authority competent to prevent and punish them. The power in existence at Greytown is claimed to be derived from the Mosquito Indians who have not been, and will not be, acknowledged as an inde-

Webster-Crampton  
arrangement.

pendent nation by this Government. Negotiations are, however, in progress for the removal of all obstacles to the jurisdiction of the Republic of Nicaragua over that port. Meanwhile a temporary recognition of the existing authority of the place, sufficient to countenance any well intended endeavors on its part to preserve the public peace and punish wrong-doers, would not be inconsistent with the policy and honor of the United States. Under these circumstances, the President has directed me to make known to you his desire that instructions be at once given to the commanding officer of the United States Home Squadron, or to the officer in command of any United States vessel of war now at Greytown, in conjunction with her Britannic Majesty's Admiral, or such other officer commanding Her Britannic Majesty's vessels belonging to the squadron under his command, to see that all reasonable municipal and other regulations in force there are respected by the vessels and citizens of the United States resorting thither, and also, should any of those regulations appear to be manifestly unreasonable in their nature and improperly enforced, to give notice thereof, in concert with Her Britannic Majesty's Admiral, or other officer as above, to the acting authorities and procure them to be modified accordingly. The President likewise desires that, if any tonnage duties or port charges levied on vessels there should be found to be exorbitant in amount, or discriminating in their nature, or when collected notoriously applied to improper purposes, you will instruct one or the other of those officers to protest in accordance (*sic*) with Her Britannic Majesty's Admiral or other officer against them, and to do all that may be proper towards having the abuses corrected. In view of the success of high public objects, it is important that these orders should be executed with moderation, temper and firmness, and the President does not doubt that they will be thus carried out. Instructions similar to the above will be addressed by Her Britannic Majesty's Government to the Admiral commanding on the West India station."

Mr. Webster, Sec. of State, to Mr. Graham, Sec. of Navy, March 17, 1852, 40 MS. Dom. Let. 24.

See, to the same effect, Mr. Webster, Sec. of State, to Commodore Parker, U. S. N., March 13, 1852, 41 Br. & For. State Papers, 796.

See also message of President Fillmore, Jan. 21, 1853, S. Ex. Doc. 27, 32 Cong. 2 sess.

"The settlement of the question respecting the port of San Juan de Nicaragua and of the controversy between the Republics of Costa Rica and Nicaragua in regard to their boundaries was considered indispensable to the commencement of the ship-canal between the two oceans, which was the subject of the convention between the United States and Great Britain of the 19th of April, 1850. Accordingly, a proposition for the same purposes, addressed to the two Governments in that quarter and to the Mosquito Indians, was agreed

to in April last by the Secretary of State and the minister of Her Britannic Majesty. Besides the wish to aid in reconciling the differences of the two Republics, I engaged in the negotiation from a desire to place the great work of a ship-canal between the two oceans under one jurisdiction and to establish the important port of San Juan de Nicaragua under the government of a civilized power. The proposition in question was assented to by Costa Rica and the Mosquito Indians. It has not proved equally acceptable to Nicaragua, but it is to be hoped that the further negotiations on the subject which are in train will be carried on in that spirit of conciliation and compromise which ought always to prevail on such occasions, and that they will lead to a satisfactory result."

President Fillmore, annual message, Dec. 6, 1852. (Richardson's Messages and Papers, V. 166.)

The proposed basis for the settlement of Central American affairs, above referred to, was signed at Washington, by Mr. Webster, Secretary of State, and Sir John Crampton, British minister, April 30, 1852. The Mosquito Indians were to be permitted to reserve for themselves a certain portion of territory. All the rest of the territory claimed by them, including Greytown, they were to relinquish to Nicaragua; and they were to have the right definitively to incorporate themselves into Nicaragua. The public authority in Greytown was to be exercised by Nicaragua, but no duty, except tonnage dues necessary for preserving and lighting the port, was to be charged on goods in transit. A definition was made of the rights of boundary and navigation of Nicaragua and Costa Rica. It was agreed, in conformity with Art. II. of the Clayton-Bulwer treaty, that the distance within which vessels should be exempt from blockade, detention or capture should be 25 miles from either end of the canal. The American Atlantic and Pacific Ship-Canal Company was to have a year to comply with the stipulations of Art. VII. of the Clayton-Bulwer treaty. The two governments were also to extend their protection to the Accessory Transit Company. Finally, the American and British diplomatic representatives in Costa Rica and Nicaragua were to be instructed to endeavor to induce those governments to accept the terms of the arrangement. (Correspondence in relation to the Proposed Inter-oceanic Canal (Washington, 1885), 102-104.)

See, also, Mr. Webster, Sec. of State, to Mr. Lawrence, min. to England, May 14, 1852, Cor. in relation to the Proposed Inter-oceanic Canal (Washington, 1885), 13, 242; Mr. Lawrence to Mr. Webster, June 8, 1852, id. 243; Mr. Everett, Sec. of State, to Mr. Kerr, min. to Cent. Am., Dec. 30, 1852, id. 13.

See message of President Fillmore to the Senate, Feb. 18, 1853, accompanied with correspondence with the British minister concerning the inter-oceanic canal, S. Ex. Doc. 44, 32 Cong. 2 sess.

"The United States cannot recognize as valid any title set up by the people at San Juan derived from the Mosquito Indians. It concedes to this tribe of Indians only a possessory right—a right to occupy and use for themselves the country in their possession, but not the right of sovereignty or eminent domain over it."

Position of Mr.  
Marcy.

Mr. Marcy, Sec. of State, to Mr. Ingersoll, June 9, 1853, MS. Inst. Gr. Brit. XVI. 210.

See, also, Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, July 2, 1853, H. Ex. Doc. 1, 34 Cong. 1 sess. 42; same to same, Sept. 12, 1853, id. 49; Dec. 1, 1853, id. 50.

"The political condition of what is called the Mosquito Kingdom has for several years past been a matter of discussion between the United States and Great Britain. This Government has uniformly held that the Mosquito Indians are a savage tribe, and that though they have rights as the occupants of the country where they are, they have no sovereign or political authority there, and no capacity to transfer to individuals an absolute and permanent title to the lands in their possession, and that the right of eminent domain—which only can be the source of such title—is in certain of the Central American States.

"If the emigrants [persons purposing to settle in the Mosquito territory] should be formed into companies, commanded by officers, and furnished with arms, such organization would assume the character of a military expedition, and being hardly consistent with professions of peaceful objects, would devolve upon this Government the duty of inquiring whether it be not a violation of our neutrality act." (Mr. Marcy, Sec. of State, to Mr. Kinney, Feb. 4, 1855, 43 MS. Dom. Let. 362.)

Mr. Cushing, as Attorney General, in 1853, advised that, although the pretension of a protectorate over the Mosquito Indians was inadmissible, yet neither party to the Clayton-Bulwer treaty had by that instrument renounced the right to afford protection in Central America in proper cases. (8 Op. 436.)

See Dallas' Letters from London, I. 11; T. J. Lawrence's Essays on Int. Law, 89 et seq.; Lawrence's Wheaton (1863), 71.

"The British Government deny that it has yielded anything by that (1850) treaty in regard to its protectorate of the Mosquito Indians. It, however, professes a willingness, as I understand, to withdraw that protectorate if the Government of Nicaragua can be induced to treat the Mosquitos fairly and allow them some compensation for the territory now claimed by them, for the relinquishment of their occupancy, and for the peaceable surrender of it to Nicaragua. Admitting these Indians to be what the United States and Nicaragua regard them, a savage tribe, having only possessory rights to the country they occupy, and not the sovereignty of it, they cannot fairly be required to yield up their actual possessions without some compensation. Might not this most troublesome element in this Central American question be removed by Nicaragua in a way just in itself, and entirely compatible with her national honor? Let her arrange this matter as we arrange those of the same character with the Indian tribes inhabiting portions of our own territory."

Mr. Marcy, Sec. of State, to Mr. Borland, min. to Cent. Am., June 17, 1853, MS. Inst. Am. St. XV. 177.

"The United States Government, in its correspondence with the British Government, has denied the pretensions set up for the people

at San Juan de Nicaragua (or Greytown) to any political organization or power derived in any way or form from the Mosquitos."

Ibid.

"The protectorate which Great Britain has assumed over the Mosquito Indians is a most palpable infringement of her treaties with Spain, to which reference has just been made; and the authority she is there exercising, under pretense of this protectorate, is in derogation of the sovereign rights of several of the Central American States, and contrary to the manifest spirit and intention of the treaty of April 19, 1850, with the United States.

"Though, ostensibly, the direct object of the Clayton and Bulwer treaty was to guarantee the free and common use of the contemplated ship-canal across the Isthmus of Darien, and to secure such use to all nations by mutual treaty stipulations to that effect, there were other and highly important objects sought to be accomplished by that convention. The stipulation regarded most of all, by the United States, is that for discontinuing the use of her assumed protectorate of the Mosquito Indians, and with it the removal of all pretext whatever for interfering with the territorial arrangements which the Central American States may wish to make among themselves. It was the intention, as it is obviously the import, of the treaty of April 19, 1850, to place Great Britain under an obligation to cease her interpositions in the affairs of Central America, and to confine herself to the enjoyment of her limited rights in the Belize. She has, by this treaty of 1850, obligated herself not to occupy or colonize any part of Central America, or to exercise any dominion therein. Notwithstanding these stipulations, she still asserts the right to hold possession of, and to exercise control over large districts of that country and important islands in the Bay of Honduras, the unquestionable appendages of the Central American States. This jurisdiction is not less mischievous in its effects, nor less objectionable to us, because it is covertly exercised (partly, at least) in the name of a miserable tribe of Indians, who have, in reality, no political organization, no actual government, not even the semblance of one, except that which is created by British authority and upheld by British power."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, July 2, 1858, H. Ex. Doc. 1, 34 Cong. 1 sess. 42.

"So far as I am aware, this Government has never had occasion to take the question of the proprietorship of those [the Mosquito] islands into consideration. I cannot say, beforehand, what would be the opinion of the Department on the subject, as we make it a rule to express no opinion upon a hypothetical case.

"It is obvious, however, from the names of the islands, that they were discovered by the Spaniards. Though this, unaccompanied by actual occupancy, may not have imparted to Spain any right of own-

ership to the exclusion of the citizens or subjects of other countries, yet, as the islands lie within a short distance of the Mosquito coast, it is quite probable that, if they had, for any purpose, been visited by persons not owing allegiance to Spain, she might have endeavored to prevent this. It is more certain that she would have endeavored to prevent any other nation from occupying them for military or naval purposes. The rights of sovereignty possessed by Spain in Central America extended, as we claim, over the territory actually conquered or obtained by contract from the aborigines, as well as over that the Indian title to which had not been extinguished. The British Government contends that the Indian title to the Mosquito coast has never been extinguished; and partly on that ground asserts the right to protect the inhabitants of that coast. It is not unlikely that that Government might also contend that the islands to which you refer belong by right of proximity to the Mosquito shore and, therefore, that its right of protection extends to them also."

Mr. Marcy, Sec. of State, to Messrs. Thompson and Oudeshuys, Dec. 27, 1853, 42 MS. Dom. Let. 124.

"In relation to the Clayton and Bulwer treaty, about which so much is said in your dispatches, I have only to remark that this Government considers it a subsisting contract, and feels bound to observe its stipulations so far as by fair construction they impose obligations upon it.

"If Great Britain has failed, or shall fail, on her part to fulfill the obligations she has therein assumed, or if she attempts to evade them by a misconstruction of that instrument, the discussions that may arise on these subjects must necessarily take place between the parties to it. The views taken of that treaty by the United States, and your course in relation to it, pointed out in your first instructions, will be observed until you receive notice of their modification. In these instructions you were furnished with the views of one of the contracting parties (Great Britain), but at the same time you were informed that the United States did not concur in them. In the negotiations at London, in regard to the affairs of Central America, the meaning of that instrument will come directly under discussion. So far as respects your mission, you will regard it as meaning what the American negotiator intended when he entered into it, and what the Senate must have understood it to mean when it was ratified, viz, that by it Great Britain came under engagements to the United States to recede from her asserted protectorate of the Mosquito Indians, and to cease to exercise dominion or control in any part of Central America. If she had any colonial possessions therein at the date of the treaty, she was bound to abandon them, and equally bound to abstain from colonial acquisitions in that region. In your official intercourse with the States of Central America, you will present this construction of the treaty as the one given to it by your Government.



"It is believed that Great Britain has a qualified right over a tract of country called the Belize, from which she is not ousted by this treaty, because no part of that tract, when restricted to its proper limits, is within the boundaries of Central America."

Mr. Marcy, Sec. of State, to Mr. Borland, Dec. 30, 1853, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 247.

"It would be a vain labor to trace the history of the connection of Great Britain with the Mosquito shore and other portions of Central America, previous to her treaties with Spain of 1783 and 1786. This connection doubtless originated from her desire to break down the monopoly of trade which Spain so jealously enforced with her American colonies, and to introduce into them British manufactures. The attempts of Great Britain to accomplish this object were pertinaciously resisted by Spain, and became the source of continual difficulties between the two nations. After a long period of strife these were happily terminated by the treaties of 1783 and 1786, in as clear and explicit language as ever was employed on any similar occasion; and the history of the time rendered the meaning of this language, if possible, still more clear and explicit.

"Article VI. of the treaty of peace of 3d September, 1783, was very distasteful to the King and Cabinet of Great Britain. This abundantly appears from Lord John Russell's 'Memorials and Correspondence of Charles James Fox.' The British Government, failing in their efforts to have this article deferred for six months, finally yielded a most reluctant consent to its insertion in the treaty.

"Why this reluctant consent? Because Article VI. stipulates that, with the exception of the territory between the river Wallis or Belize and the Rio Hondo, within which permission was granted to British subjects to cut log-wood, 'all the English who may be dispersed in any other parts, whether on the Spanish continent ("continente Espagnol"), or in any of the islands whatsoever dependent on the aforesaid Spanish continent, and for whatever reason it might be, without exception, shall retire within the district above described in the space of eighteen months, to be computed from the exchange of ratifications.'

"And the treaty further expressly provides, that the permission granted to cut logwood 'shall not be considered as derogating, in any wise, from his [Catholic Majesty's] rights of sovereignty' over this logwood district; and it stipulates, moreover, 'that if any fortifications should have been actually heretofore erected within the limits marked out, His Britannic Majesty shall cause them all to be demolished, and he will order his subjects not to build any new ones.'

"But, notwithstanding these provisions, in the opinion of Mr. Fox, it was still in the power of the British Government 'to put our [their] own interpretation upon the words "continente Espagnol," and to

Buchanan - Clarendon negotiations;  
Buchanan's statement of Jan. 6, 1854.

determine, upon prudential considerations, whether the Mosquito shore comes under that description or not.'

"Hence the necessity for new negotiations which should determine, precisely and expressly, the territory embraced by the treaty of 1783. These produced the convention of the 14th of July, 1786; and its very first article removed every doubt on the subject. This declared that 'His Britannic Majesty's subjects, and the other colonists who have hitherto enjoyed the protection of England, shall evacuate the country of the Mosquitos, as well as the continent in general, and the islands adjacent, without exception,' situated beyond the new limits prescribed by the convention within which British subjects were to be permitted to cut, not only logwood but mahogany and all other wood; and even this district is 'indisputably acknowledged to belong of right to the Crown of Spain.'

"Thus, what was meant by the 'continente Espagnol' in the treaty of 1783, is defined, beyond all doubt, by the convention of 1786; and the sovereignty of the Spanish King over the Mosquito shore, as well as over every other portion of the Spanish continent and the islands adjacent, is expressly recognized.

"It was just that Great Britain should interfere to protect the Mosquito Indians against the punishment to which they had exposed themselves as her allies from their legitimate and acknowledged sovereign. Article XIV. of the convention, therefore, provides that 'His Catholic Majesty, prompted solely by motives of humanity, promises to the King of England that he will not exercise any act of severity against the Mosquitos inhabiting in part the countries which are to be evacuated by virtue of the present convention, on account of the connections which may have subsisted between the said Indians and the English: and His Britannic Majesty, on his part, will strictly prohibit all his subjects from furnishing arms or warlike stores to the Indians in general situated upon the frontiers of the Spanish possessions.'

"British honor required that these treaties with Spain should be faithfully observed; and from the contemporaneous history no doubt exists but that this was done; that the orders required by Article XV. of the convention were issued by the British Government, and that they were strictly carried into execution.

"In this connection a reference to the significant proceedings in the House of Lords on the 26th of March, 1787, ought not to be omitted. On that day a motion was made by Lord Rawdon 'that the terms of the convention of July 14, 1786, do not meet the favorable opinion of this House.' The motion was discussed at considerable length, and with great ability. The task of defending the ministry upon this occasion was undertaken by Lord Chancellor Thurlow, and was most triumphantly performed. He abundantly justified the ministry for having surrendered the Mosquito shore to Spain; and proved 'that the Mosquitos were not our allies; they were not a people we were bound by

treaty to protect.' His lordship repelled the argument that the Settlement was a regular and legal Settlement, with some sort of indignation; and so far from agreeing, as had been contended, that we had remained uniformly in the quiet and unquestionable possession of our claim to the territory, he called upon the noble Viscount Stormont to declare, as a man of honor, whether he did not know the contrary.

"Lord Rawdon's motion to condemn the convention was rejected by a vote of 53 to 17.

"It is worthy of special remark that all sides of the House, whether approving or disapproving the convention, proceeded upon the express admission that it required Great Britain, employing its own language, 'to evacuate the country of the Mosquitos.' On this question the House of Lords were unanimous.

"At what period, then, did Great Britain renew her claims to 'the country of the Mosquitos, as well as the continent in general; and the islands adjacent without exception?' It certainly was not in 1801, when, under the Treaty of Amiens, she acquired the island of Trinidad from Spain, without any mention whatever of further acquisitions in America. It certainly was not in 1809, when she entered into a treaty of alliance, offensive and defensive, with Spain, to resist the Emperor Napoleon in his attempt to conquer the Spanish monarchy. It certainly was not in 1814, when the commercial treaties which had previously existed between the two powers, including, it is presumed, those of 1783 and 1786, were revived. On all these occasions there was no mention whatever of any claims of Great Britain to the Mosquito Protectorate, or to any of the Spanish-American territories which she had abandoned. It was not in 1817 and 1819, when acts of the British Parliament (57 and 59 Geo. III.), distinctly acknowledged that the British Settlement at Belize was 'not within the territory and dominion of His Majesty,' but was merely 'a Settlement for certain purposes, in the possession and under the protection of His Majesty;' thus evincing a determined purpose to observe with the most scrupulous good faith the treaties of 1783 and 1786 with Spain.

"In the very sensible book of Captain Bonnycastle, of the corps of British Royal Engineers, 'On Spanish America,' published at London, in 1818, he gives no intimation whatever that Great Britain had revived her claim to the Mosquito Protectorate. On the contrary, he describes the Mosquito shore as 'a tract of country which lies along part of the northern and eastern shore of Honduras,' which had 'been claimed by the British.' He adds, 'the English held this country for eighty years, and abandoned it in 1787 and 1788.'

"Thus matters continued until a considerable period after 1821, in which year the Spanish provinces composing the captain-generalship of Guatemala asserted and maintained their independence of Spain. It would be a work of supererogation to attempt to prove, at this period of the world's history, that these provinces having, by a suc-

successful revolution, become independent states, succeeded within their respective limits to all the territorial rights of Spain. This will surely not be denied by the British Government, which took so noble and prominent a part in securing the independence of all the Spanish-American provinces.

“Indeed, Great Britain has recorded her adhesion to this principle of international law in her treaty of December 26, 1826, with Mexico, then recently a revolted Spanish colony. By this treaty, so far from claiming any right beyond the usufruct which had been conceded to her under the convention with Spain in 1786, she recognizes its continued existence and binding effect, as between herself and Mexico, by obtaining and accepting from the Government of the latter, a stipulation that British subjects shall not be ‘disturbed or molested in the peaceable possession and exercise of whatever rights, privileges, and immunities, they have at any time enjoyed within the limits described and laid down’ by that convention. Whether the former Spanish sovereignty over Belize, subject to the British usufruct, reverted of right to Mexico or to Guatemala, may be seriously questioned; but, in either case, this recognition by Great Britain is equally conclusive.

“And here it may be appropriate to observe that Great Britain still continues in possession not only of the district between the Rio Hondo and the Sibun, within which the King of Spain had granted her a license to cut mahogany and other woods; but the British settlers have extended this possession south to the river Sarstoon, one degree and a half of latitude beyond ‘the limits described and laid down’ by this convention. It is presumed that the encroachments of these settlers south of the Sibun have been made without the authority or sanction of the British Crown, and that no difficulty will exist in their removal.

“Yet, in view of all these antecedents, the island of Ruatan, belonging to the State of Honduras, and within sight of its shores, was captured, in 1841, by Colonel McDonald, then Her Britannic Majesty’s superintendent at Belize, and the flag of Honduras was hauled down, and that of Great Britain was hoisted in its place. This small State, incapable of making any effectual resistance, was compelled to submit, and the island has ever since been under British control. What makes this event more remarkable is, that it is believed a similar act of violence had been committed on Ruatan by the superintendent of Belize in 1835; but on complaint by the Federal Government of the Central American States then still in existence, the act was formally disavowed by the British Government, and the island was restored to the authorities of the Republic.

“No question can exist but that Ruatan was one of the ‘islands adjacent’ to the American continent which had been restored by Great Britain to Spain under the treaties of 1783 and 1786. Indeed, the most approved British gazetteers and geographers, up till the present date, have borne testimony to this fact, apparently without information

from that hitherto but little known portion of the world, that the island had again been seized by Her Majesty's superintendent at Belize, and was now a possession claimed by Great Britain.

"When Great Britain determined to resume her dominion over the Mosquito shore, in the name of a protectorate, is not known with any degree of certainty in the United States. The first information on the subject in the Department of State, at Washington, was contained in a dispatch of the 20th January, 1842, from William S. Murphy, Esq., special agent of the American Government to Guatemala, in which he states that in a conversation with Colonel McDonald at Belize, the latter had informed him that he had discovered and sent documents to England, which caused the British Government to revive their claim to the Mosquito territory.

"According to Bonnycastle, the Mosquito shore 'lies along part of the northern and eastern shore of Honduras;' and by the map which accompanies his work, extends no further south than the mouth of the river Segovia, in about 12° north latitude. This respectable author certainly never could have imagined that it extended south to San Juan de Nicaragua, because he describes this as the principal seaport of Nicaragua on the Caribbean Sea, says there are 'three portages' between the lake and the mouth of the river, and 'these carrying places are defended, and at one of them is the fort San Juan, called also the Castle of Nuestra Señora, on a rock, and very strong; it has 36 guns mounted, with a small battery, whose platform is level with the water; and the whole is inclosed on the land side by a ditch and rampart. Its garrison is generally kept up at 100 infantry, 16 artillerymen, with about 60 of the militia, and is provided with bateaux, which row guard every night up and down the stream.' Thus, it appears, that the Spaniards were justly sensible of the importance of defending this outlet from the lake of Nicaragua to the ocean; because, as Captain Bonnycastle observes, 'this port (San Juan) is looked upon as the key of the Americas; and with the possession of it and Realejo, on the other side of the lake, the Spanish colonies might be paralyzed, by the enemy being then master of the ports of both oceans.' He might have added, that nearly 60 years ago, on the 26th February, 1796, the port of San Juan de Nicaragua was established as a port of entry, of the second class, by the King of Spain. Captain Bonnycastle, as well as the Spaniards, would have been greatly surprised had they been informed that this port was a part of the dominions of His Majesty the King of the Mosquitos, and that the cities and cultivated territories of Nicaragua, surrounding the lakes Nicaragua and Managua, had no outlet to the Caribbean Sea, except by his gracious permission.

"It was, therefore, with profound surprise and regret [that] the Government and people of the United States learned that a British force, on the 1st of January, 1848, had expelled the State of Nicaragua

from San Juan, had hauled down the Nicaraguan flag, and had raised the Mosquito flag in its place. The ancient name of the town, San Juan de Nicaragua, which had identified it in all former times as belonging to Nicaragua, was on this occasion changed, and thereafter it became Greytown.

“These proceedings gave birth to serious apprehensions throughout the United States that Great Britain intended to monopolize for herself the control over the different routes between the Atlantic and the Pacific, which, since the acquisition of California, had become of vital importance to the United States. Under this impression, it was impossible that the American Government could any longer remain silent and acquiescing spectators of what was passing in Central America.

“Mr. Monroe, one of our wisest and most discreet Presidents, announced in a public message to Congress, in December, 1823, that ‘the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered subjects for future colonization by any European powers.’ This declaration has since been known throughout the world as the ‘Monroe Doctrine,’ and has received the public and official sanction of subsequent Presidents, as well as of a large majority of the American people.

“Whilst this doctrine will be maintained whenever, in the opinion of Congress, the peace and safety of the United States shall render this necessary, yet to have acted upon it in Central America might have brought us into collision with Great Britain—an event always to be deprecated, and, if possible, avoided. We can do each other the most good, and the most harm, of any two nations in the world; and, therefore, it is our strong mutual interest, as it ought ever to be our strong mutual desire, to remain the best friends. To settle these dangerous questions, both parties wisely resorted to friendly negotiations, which resulted in the convention of April, 1850. May this prove to be instrumental in finally adjusting all questions of difficulty between the parties in Central America, and in perpetuating their peace and friendship!

“Surely the Mosquito Indians ought not to prove an obstacle to so happy a consummation. Even if these savages had never been actually subdued by Spain, this would give them no title to rank as an independent state, without violating the principles and the practice of every European nation, without exception, which has acquired territory on the continent of America. They all mutually recognized the right of discovery, as well as the title of the discoverer to a large extent of interior territory, though at the moment occupied by fierce and hostile tribes of Indians. On this principle the wars, the negotiations, the cessions, and the jurisprudence of these nations were founded. The ultimate dominion and absolute title belonged to them-

selves, although several of them, and especially Great Britain, conceded to the Indians a right of mere occupancy, which, however, could only be extinguished by the authority of the nation within whose dominions these Indians were found. All sales or transfers of territory made by them to third parties were declared to be absolutely void; and this was a merciful rule even for the Indians themselves, because it prevented them from being defrauded by dishonest individuals.

"No nation has ever acted more steadily upon these principles than Great Britain; and she has solemnly recognized them in her treaties with the King of Spain, of 1783 and 1786, by admitting his sovereignty over the Mosquitos.

"Shall the Mosquito tribe of Indians constitute an exception from this hitherto universal rule? Is there anything in their character or in their civilization which would enable them to perform the duties and sustain the responsibilities of a sovereign state in the family of nations?

"Bonnycastle says of them, that they 'were formerly a very powerful and numerous race of people, but the ravages of rum and the smallpox have diminished their number very much.' He represents them, on the authority of British settlers, as seeming 'to have no other religion than the adoration of evil spirits.' The same author also states, that 'the warriors of this tribe are accounted at 1,500.' This possibly may have been correct in 1818, when the book was published, but at present serious doubts are entertained whether they reach much more than half that number. The truth is, they are now a debased race, and are degraded even below the common Indian standard. They have acquired the worst vices of civilization from their intercourse with the basest class of the whites, without any of its redeeming virtues. The Mosquitos have been thus represented by a writer of authority, who has recently enjoyed the best opportunities for personal observation. That they are totally incapable of maintaining an independent civilized government is beyond all question. Then in regard to their so-called King, Lord Palmerston, in speaking of him to Mr. Rives, in September, 1851, says, 'They had what was called a King, who, by-the-bye,' he added, in a tone of pleasantry, 'was as much of a king as you or I.' And Lord John Russell, in his dispatch to Mr. Crampton of the 19th of January, 1853, denominates the Mosquito Government as 'a fiction;' and speaks of the King as a person 'whose title and power are, in truth, little better than nominal.'

"The moment Great Britain shall withdraw from Blewfields, where she now exercises exclusive dominion over the Mosquito shore, the former relations of the Mosquitos to Nicaragua and Honduras as the successors of Spain, will naturally be restored. When this event shall occur, it is to be hoped that these States in their conduct towards the Mosquitos and the other Indian tribes within their territories, will

follow the example of Great Britain and the United States. Whilst neither of these has ever acknowledged, or permitted any other nation to acknowledge, any Indian tribe, within their limits, as an independent people, they have both recognized the qualified right of such tribes to occupy the soil, and as the advance of the white settlements rendered this necessary, have acquired their title by a fair purchase.

“Certainly it cannot be desired that this extensive and valuable Central American coast, on the highway of nations between the Atlantic and Pacific, should be appropriated to the use of 3,000 or 4,000 wandering Indians, as an independent state, who would use it for no other purpose than that of hunting and fishing, and savage warfare. If such an event were possible, the coast would become a retreat for pirates and outlaws of every nation, from whence to infest and disturb the commerce of the world on its transit across the Isthmus; and but little better would be its condition should a new independent state be established on the Mosquito shore. Besides, in either event, the present Central American States would deeply feel the injustice which had been done them in depriving them of a portion of their territories; they would never cease in attempts to recover their rights, and thus strife and contention would be perpetuated in that quarter of the world where it is so much the interest both of Great Britain and the United States that all territorial questions should be speedily, satisfactorily, and finally adjusted.”

Statement of Mr. Buchanan, min. to England, for the Earl of Clarendon, Jan. 6, 1854, 46 Br. & For. State Papers, 244, 247; H. Ex. Doc. 1, 34 Cong. 1 sess. 55.

To the foregoing statement by Mr. Buchanan, Lord Clarendon replied by a statement dated May 2, 1854. This statement of May 2, 1854. statement may be summarized as follows:

1. That, although Great Britain held no “possessions” in the Mosquito territory, she undoubtedly exercised a great and extensive influence over it as the “protecting ally” of the Mosquito chief or king, who had “occasionally been even crowned at Jamaica under the auspices of the British authorities;” that the United States would scarcely expect Great Britain to enter into explanations concerning acts committed nearly forty years before, in a matter in which no right or possession of the United States was involved; and that the Government of Spain, after the peace of 1815, never raised any question with respect to the Mosquito protectorate.

2. That Great Britain had not by her treaty with Mexico, or otherwise, recognized as a principle that the engagements between herself and Spain were necessarily transferred to every fraction of the Spanish monarchy which came to exist on a distinct and independent basis; that Great Britain had merely stipulated in the treaty with Mexico that



British subjects should not be worse off under independent Mexico than in Mexico as a Spanish province.

3. That, even admitting that it might in some cases be expedient to recognize the rights and obligations of old Spain as having become vested in the new Spanish American states, it was to be observed that no remonstrance was made by any of the Spanish-American republics against the British protectorate over Mosquito till many years after its existence became known to them, and that, when such remonstrances were made, they were made by several of those governments, so that, if Great Britain had withdrawn, the right of any of them to occupy the territory would have been disputed by the others.

4. That, up to the end of 1849, the United States, although informed in 1842 of the existence of the Mosquito protectorate, made no allusion to it in communications to the British Government, notwithstanding the fact that, as appeared by papers submitted to Congress, some action as against Great Britain had repeatedly been solicited by the authorities of Nicaragua; and that, even with respect to the capture of Greytown by British forces acting in behalf of the Mosquito king, the American minister in London was not authorized to take any steps.

5. That, with regard to the doctrine laid down by President Monroe in 1823, concerning future colonization on the American continent by European states, it could be viewed only as the dictum of the distinguished personage who announced it, and not as an international axiom which ought to regulate the conduct of European states.

6. That the doctrine that the Indians were incapable of exercising the rights of sovereign powers was one on which each state must maintain its own policy and follow the dictates of its own conscience, and that the habits of past times could not be taken as an invariable guide for any future policy, as was shown by the case of the slave-trade.

7. That, although Great Britain never claimed any sovereignty over Mosquito, she asserted that the treaty of 1850 did not and was not meant to annihilate her protectorate, but only to confine its powers and limit its influence; and that the treaty, while it did not "recognize" any protectorate, clearly acknowledged (Art. I.) the possibility of Great Britain or of the United States affording protection to Mosquito or to any Central American state.

8. That it never had been held that territories or kingdoms which were neutralized might not be defended by other kingdoms, at the desire and request of the neutral states, and that it could not be maintained that the bar to colonizing and fortifying was a bar to all protection.

9. That Great Britain and the United States bound themselves to protect certain canals or railways which might be formed through various independent states, but that they did not by this agreement to give protection acquire any right of sovereignty or occupation over such canals or railways, although they carefully excluded themselves

from having any exclusive control over them and from acquiring any exclusive privileges.

10. That the correctness of the British construction was further shown by the fact that, soon after the treaty was ratified, her Majesty's minister at Washington entered into further negotiations with the United States relative to the position of Mosquito, and that the interpretation above expressed was at once accepted by Mr. Webster; and that the fact that Great Britain was not at any time animated by the object of obtaining any peculiar influence or control over the San Juan river or the canal was shown by the circumstance that the object of the negotiations was the withdrawal of her protection from Greytown and the adjoining territory on conditions beneficial to her, only so far as they tended to maintain a state of peace and tranquillity in the part of the world to which they related.

11. That it never was in the contemplation of either government that the treaty of 1850 should interfere in any way with her Majesty's settlement at Belize or its dependencies.

12. That the limits of the British settlement at Belize could not be restricted to the boundaries under the treaty of 1786, not only because the treaties with old Spain could not be held to be necessarily binding with respect to detached portions of the old monarchy, but also because the treaty of 1786 was put an end to by a subsequent state of war between Great Britain and Spain, during which the boundaries of the British settlement in question were enlarged.

13. That, as to Ruatan and the adjoining islands, all that could be debatable concerning them was, whether they were dependencies of Belize or attached to some Central American state; and that it could not be disputed that, whenever Ruatan had been permanently occupied, either in remote or recent times, by anything more than a military guard or flagstaff, the occupation had been by British subjects.

14. That the practical question at issue relative to Greytown and the adjacent territory was not whether Great Britain should exercise dominion over it, but whether Nicaragua or some other independent state should be put into possession of it in such manner as to preserve the honorable obligations of Great Britain, the peace of Central America and the safety of the Mosquito Indians, or in such manner as to produce hostilities between Nicaragua and Costa Rica and the destruction of the Mosquito people.

15. That, as the pretensions of Great Britain to the islands of Ruatan and Bonacca were not of recent date and were not questioned by the United States in 1850, it could not be admitted that an alteration in the internal form of their government was a violation of the treaty or afforded a just cause of remonstrance to the United States.

For extended "Remarks" of Mr. Buchanan, July 22, 1854, in reply to Lord Clarendon's statement, see 46 Brit. & For. State Pap. 272: H. Ex. Doc. 1, 34 Cong. 1 sess. 93.

"A protectorate necessarily implies the actual existence of a sovereign authority in the protected power; but where there is, **Marcy's views.** in fact, no such authority there can be no protectorate. The Mosquitos are a convenience to sustain British pretensions, but cannot be regarded as a sovereign state. Lord Palmerston, as was evinced by his remark to Mr. Rives, took this view of the political condition of the Mosquitos, and it is so obviously correct that the British Government should not be surprised if the United States consider the subject in the same light."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, Aug. 6, 1855, H. Ex. Doc. 1, 34 Cong. 1 sess. 69, 71, where the full text is given.

See President Pierce's annual message, Dec. 31, 1855, H. Ex. Doc. 1, 34 Cong. 1 sess., and the accompanying correspondence in relation to the various questions under the Clayton-Bulwer treaty.

See, also, on the same subject, President Pierce's message of Feb. 14, 1856, S. Ex. Doc. 25, 34 Cong. 1 sess.

See S. Ex. Docs. 12 and 27, 32 Cong. 2 sess., and S. Ex. Doc. 1, 34 Cong. 1 sess.; J. C. B. Davis' Treaty Notes (Treaty Vol. 1776-1887), 1332.

"The President cannot himself admit as true, and therefore cannot under any possible circumstances advise the Republic of Nicaragua to admit, that the Mosquito Indians are a state or a government any more than a band of Maroons in the island of Jamaica are a state or government. Neither, of course, can he admit that any alliance or protective connection of a political nature may exist for any purpose whatever between Great Britain and those Indians."

Mr. Marcy, Sec. of State, to Mr. Dallas, min. to England, July 26, 1856, MS. Inst. Gr. Brit. XVII. 1, 17.

See Mr. Marcy, Sec. of State, to Mr. Dallas, min. to England, No. 24, July 28, 1856; No. 31, Sept. 26, 1856; confidential, Sept. 26, 1856; No. 38, Nov. 10, 1856: MS. Inst. Gr. Br. XVII. 26, 33, 41, 49.

See, also, Mr. Cass, Sec. of State, to Mr. Dallas, No. 57, March 21, 1857, MS. Inst. Gr. Br. XVII. 67.

### 3. HISTORICAL SUMMARY, 1851-1858.

#### § 355.

"I have had the honor to receive the copy which your lordship did me the favor to send me of Lord Malmesbury's dispatch to your lordship of August 18, in reference to Sir William Ouseley's mission, and have submitted it to the consideration of the President. From the statement of Lord Malmesbury that the British Government has no remaining alternative but that of leaving the Cabinet of Washington

**Mr. Cass to Lord Napier, Nov. 8, 1858.**

to originate any further overtures for an adjustment of these controversies, it is quite obvious that the position of the President on this subject is not correctly understood by Her Majesty's Government. Since the announcement by your lordship in October, 1857, of Sir William Ouseley's special mission, the President has awaited not so much any new proposition for the adjustment of the Central American question as the statement in detail which he had been led to expect of the method by which Sir William Ouseley was to carry into effect the previous proposition of the British Government. To make this plain, your lordship will pardon me for making a brief reference to what has occurred between the two governments in respect to Central America since the ratification of the Clayton-Bulwer treaty of 1850.

"While the declared object of that convention had reference to the construction of a ship-canal, by the way of San Juan and the lakes of Nicaragua and Managua, from the Atlantic to the Pacific oceans, yet it avowed none the less plainly a general principle in reference to all practicable communications across the Isthmus, and laid down a distinct policy by which the practical operation of this principle was likely to be kept free from all embarrassment. The principle was that the interoceanic routes should remain under the sovereignty of the states through which they ran, and be neutral and free to all nations alike. The policy was, that in order to prevent any government outside of those states from obtaining undue control or influence over these interoceanic transits, no such nation should 'erect or maintain any fortifications commanding the same, or in vicinity thereof, or should occupy or fortify or colonize or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America.'

"So far as the United States and Great Britain were concerned, these stipulations were expressed in unmistakable terms, and in reference to other nations it was declared that the contracting parties in this convention engage to invite every state with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other. At that time the United States had no possessions whatever in Central America and exercised no dominion there. In respect to this Government, therefore, the provisions of the first article of the treaty could operate only as a restriction for the future, but Great Britain was in the actual exercise of dominion over nearly the whole eastern coast of that country, and in relation to her this article had a present as well as a prospective operation. She was to abandon the occupancy which she already had in Central America, and was neither to make acquisitions or erect fortifications or exercise dominion there in the future. In other words, she was to place herself in the same position, with respect to possessions and dominion in Central America, which was to be occupied by the United States, and which both the contracting

parties to the treaty engaged that they would endeavor to induce other nations to occupy. This was the treaty as it was understood and assented to by the United States, and this is the treaty as it is still understood by this Government. Instead, however, of giving effect to it in this sense, the British Government proceeded, in 1851, only a few months after the signature to the treaty, to establish a new British colony in Central America under the name of the 'Bay Islands'; and when this Government expressed its great surprise at this proceeding and at the failure of Great Britain to comply with the terms of the convention, Her Majesty's Government replied that the islands already belonged to Great Britain at the date of the treaty, and that the convention, in their view of it, interfered with none of their existing possessions in Central America, but was wholly prospective in its character, and only prevented them from making new acquisitions. It is unnecessary to do more than simply refer to the earnest and able discussions which followed this avowal, and which show more and more plainly the opposite constructions which were placed upon the treaty by the two governments.

"In 1854 it was sought to reconcile these constructions and to terminate the Central American question by the convention which was signed at London by the American minister and Lord Clarendon, usually designated the Dallas-Clarendon treaty. The terms of this treaty are doubtless familiar to your lordship.

"It provides—

"1. For the withdrawal of the British protectorate over the Mosquito Indians and for an arrangement in their behalf upon principles which were quite acceptable to the United States.

"2. It regulated the boundaries of the Belize settlements, within which Great Britain claimed to exercise certain possessory rights upon terms which, although not wholly acceptable to this Government, were yet in a spirit of generous concession ratified by the United States Senate.

"3. It provided for a cession of the Bay Islands to Honduras (in the opinion of this Government their rightful proprietor), but this concession was made dependent upon an unratified treaty between Great Britain and Honduras, whose terms were not officially known to this Government, but which, so far as they had unofficially appeared, were not of a satisfactory character.

"The Senate, therefore, in ratifying the Dallas-Clarendon treaty, felt obliged to amend it by striking out all that part of it which contemplated the concurrence of this Government in the treaty with Honduras, and simply providing for a recognition by the two governments of the sovereign right of Honduras to the islands in question. Great Britain found itself unable to concur in this amendment, and the Dallas-Clarendon treaty, therefore, fell to the ground. It was clear, however, that the objections of the Senate to the Honduras treaty were

not deemed unreasonable by Her Majesty's Government, because, in your lordship's interview with the President on the 22d of October, 1857, your lordship 'allowed that the articles establishing the administrative independence of the islands might have been larger than was necessary.' 'I had observed,' you added, 'the same impression in the correspondence of Mr. Wyke, Her Majesty's chargé d'affaires at Guatémala, who seemed to admit that a greater participation in the internal government might be granted to the authorities of Honduras,' and you made 'no doubt that Her Majesty's Government would entertain any reasonable suggestions which might be offered to them in that sense.'

"And again, in your lordship's note to this Department of November 30, 1857, you recognize the same probability 'that the intervention of the Honduras Government in the administration of the islands may have been more limited than was necessary or even advisable.'

"Such was doubtless the opinion of Honduras, for as long ago as May 10, 1857, I was informed by your lordship that the treaty remained unratified 'owing to some objections on the part of the Government of Honduras,' and that 'Her Majesty's Government does not expect that the treaty in its present shape will be definitely sanctioned by that Republic.'

"In view of the objectionable provisions of this convention with Honduras, and of its failure to be sanctioned by that Republic, your lordship, by the authority of Lord Clarendon, informed me on the 6th of May, 1857, that Her Majesty's Government was prepared to sanction a new treaty, in respect to the Central American questions, which should in all respects conform to the Dallas-Clarendon treaty, as ratified by the Senate, except that to the simple recognition in the Senate's substitute for the second separate article of the sovereignty of Honduras over the Bay Islands there was to be added the following passage: 'Whenever and so soon as the Republic of Honduras shall have concluded and ratified a treaty with Great Britain by which Great Britain shall have ceded and the Republic of Honduras shall have accepted the said islands subject to the provisions and conditions contained in said treaty.' While this condition contemplated a new treaty with Honduras which might possibly avoid the objectionable provisions of the old one, yet it was quite impossible for the United States to become a party, either directly or indirectly to a convention which was not in existence, or whose terms and conditions it could neither know nor control. For this reason I informed your lordship in my communication of May 29, that your lordship's proposition was declined by this Government.

"The attempts to adjust the Central American questions by means of a supplementary treaty having thus failed of success, and the subjects not being of a character, in the opinion of the United States, to admit of their reference to arbitration, the two Governments were

thrown back upon their respective rights under the Clayton-Bulwer treaty. While each Government, however, had continued to insist upon its own construction of this treaty, there was reason to believe that the embarrassments growing out of their conflicting views of its provisions might be practically relieved by direct negotiation between Her Majesty's Government and the States of Central America.

"In this way it seemed possible that, without any injustice to those States, the treaty might be rendered acceptable to both countries as well as operative for the disinterested and useful purposes which it had been designed to serve. The President, therefore, was glad to learn from your lordship, on the 19th of October, 1857, that Her Majesty's Government had 'resolved to dispatch a representative of authority and experience to Central America, to make a definitive settlement of all the matters with regard to which the United States and England were still at variance, and who would be instructed,' as your lordship believed, 'to carry the Clayton-Bulwer treaty into execution according to the general tenor of the interpretation put upon it by the United States, but to do so by separate negotiation with the Central American Republics in lieu of a direct engagement with the Federal Government.' This announcement could not fail to be received with satisfaction by the President, because it contemplated the substantial accomplishment of the very purposes in respect to the treaty which the United States had always had in view, and so long as these were accomplished he assured your lordship that 'to him it was indifferent whether the concession contemplated by Her Majesty's Government were consigned to a direct engagement between England and the United States or to treaties between the former and the Central American Republics; the latter method might, in some respects he added, be even more agreeable to him, and he thought it would be more convenient to Her Majesty's Government, who might, with greater facility, accede to the claims of the weaker party.'

"It is unnecessary to refer at length to what was said in this conversation, or to a second one on the same subject which your lordship had with the President on the evening of October 23; but there can be no doubt that in both interviews the expected mission of Sir William Ouseley (who it was understood had been selected as the plenipotentiary referred to), in connection with what your lordship indicated as his probable instructions, was favorably regarded by the President. So much was this the case, that he gave your lordship his full assurance that should your lordship's announcement be confirmed by any official information such as he could use, he would change that part of his message which related to Great Britain, would encourage no attempt in Congress to annul the treaty while the mission was in progress, and nothing could give him greater pleasure, he said, 'than to add the expression of his sincere and ardent wish for the maintenance of friendly relations between the two countries.'

"At the close of the second interview, he even went so far as to remark, in reference to the extended boundary claimed by Great Britain for the Belize (to which he had ever objected), that he could make no absolute engagement in this matter; but he would say this much, 'that if the Bay Islands were fairly and handsomely evacuated, such a measure would have a great effect with him, and with the American people, in regard to the settlement of the other points at issue.'

"Sir William Ouseley arrived in Washington about the middle of November, and on the 30th of November I received from your lordship an official statement in outline of the purposes of his mission.

"On the 5th December, your lordship inclosed to me a copy of Lord Clarendon's dispatch of November 20, in which your lordship's previous statement was substantially confirmed, and in which it was further stated that 'Sir William Ouseley, during his visit to Washington, will, in pursuance of his instructions, have explained with the utmost frankness to the Government of the United States the nature of the instructions with which he is furnished, and your lordship, as the duly accredited organ of Her Majesty's Government, will have given similar explanations.'

"The objects of Sir William Ouseley's mission, as thus made known to the United States, were:

"1. To provide for the transfer by Great Britain of the Bay Islands to the Government of Honduras; and in this transfer it was especially declared that the stipulations in the British treaty with Honduras were not to be rigidly adhered to. Sir William Ouseley, on the contrary, while requiring provisions to secure the vested rights of British subjects in the Bay Islands, was to be left at liberty to contract engagements with Honduras which should embody not only an unmistakable recognition of its sovereignty over these islands; but should allow of a more direct government and a more efficient protection over them by that republic than had been contained in the convention of 1856.

"2. The second object of Sir William Ouseley's mission was the settlement of the question of the Mosquito protectorate with Nicaragua and Honduras. Whilst he was to provide for the compensation, the government, and the protection of the Mosquito Indians under the sovereignty of Nicaragua, this was to be done upon terms not less favorable than those which had received the approbation of the Senate in the Dallas-Clarendon treaty. In no degree was the Indian reserve to trespass on the territory applicable to transit purposes.

"3. The regulation of the frontier of British Honduras was to be effected by negotiation with the Government of Guatemala. Her Majesty's Government trusted to obtain from that Republic a recognition of limits 'which, if we may judge from previous communications on the subject, may be accepted in a spirit of conciliation, if not with absolute approval, by the President.'



“Such were the overtures communicated by your lordship’s note to this Department of November 30, and which were again referred to in Lord Clarendon’s note to your lordship of November 20, of which you inclosed to me a copy in your lordship’s note of December 5. Inasmuch as the announcement of Sir William Ouseley’s mission, with the explanation by your lordship of its general purposes, had been received with much satisfaction by the President, there were some expressions in this note of Lord Clarendon’s which it was not easy to understand; but which, nevertheless, did not materially change the general character of the overtures. It was still stated in that dispatch ‘that the objections entertained in the United States to the constructions placed upon that treaty by the British Government are, as every impartial person must admit, in a fair way to be removed by the voluntary act of the latter; and while the objects of Sir William’s mission continued to be mentioned in only general terms, it was yet added that during his visit to Washington he will, in pursuance of his instructions, have explained with the utmost frankness the nature of the instructions with which he is furnished, and your lordship, as the duly accredited organ of Her Majesty in the United States, will have given similar explanations.’

“The President did not hesitate, therefore, in his message to Congress, to refer to these overtures as having recently been made by the British Government in a friendly spirit, which he cordially reciprocated. He could do no more than this, whatever might be his hopes for the success of Sir William’s mission, until he had received the further explanations concerning it which he had been led to expect, and which he was prepared to consider in the kindest and most respectful manner. The general remarks contained in the outline of November 30 must have been molded in some specific form, in order to enable this Government to arrive at a practical decision upon the questions presented to it. This I understood to be the view of your lordship and Sir William Ouseley, as well as that of the President and this Department. Indeed, it was wholly in conformity with this view that Sir William Ouseley was understood to have called at Washington on his way to Central America. Had he proceeded directly to his destination, and there, by separate treaties with the Central American Republics, given substantial effect to the Clayton-Bulwer convention, according to the general tenor of the American construction of that instrument, the Central American controversy would then have been fortunately terminated to the satisfaction of both Governments. But since this Government, in a spirit of comity, which the President fully appreciates, was asked to co-operate in accomplishing this result, it was surely not unreasonable that it should know specifically the arrangements which it was expected to sanction.

“The general objects in view we were acquainted with and approved, but there was no draft of a treaty, no form of separate article, no

definition of measures. The Bay Islands were to be surrendered, but under what restrictions? The Dallas-Clarendon treaty was to be modified, but what were the modifications? The rights of British subjects and the interests of British trade were to be protected in Ruatan, but to what extent and by what conditions? Honduras was to participate more largely in the government of the Bay Islands than she was allowed to do by the convention of 1856, but how far was she to be restrained and what was to be her power?

"These and other similar questions naturally arose upon the general overtures contained in your lordship's note of November 30, and seemed naturally enough to justify the hope which was entertained of some further explanation of those overtures. In all my conversations with your lordship on the subject of Sir William's mission, subsequent to the meeting of Congress, this expectation of some further and more definite communication concerning it was certainly taken for granted, and until time was given to receive such a communication, you did not press for any answer to your lordship's note of November 20. In the beginning your lordship seemed to think that some embarrassment or delay in prosecuting the mission might be occasioned by the expedition to Nicaragua which had been undertaken by General Walker, and by the Cass-Yrisarri treaty which had been negotiated with that Republic by the United States; but the treaty was not disapproved by Her Majesty's Government and the expedition of Walker was promptly repressed, so that no embarrassment from these sources would be further apprehended. As the delay still continued, it was suggested by your lordship, and fully appreciated by me, that Her Majesty's Government was necessarily occupied with the affairs of Her Majesty's possessions in India, which then claimed its immediate attention to the exclusion naturally of business which was less pressing, and hence I awaited the expected instructions without any anxiety whatever. All this is precisely what your lordship very frankly describes in your lordship's communication to this Department of April 12, 1858. 'I addressed my Government,' your lordship says, 'with a view to obtaining further explanations and instructions, and I informed you that it was not my desire to press for an official reply to the overtures of the Earl of Clarendon pending an answer from London.'

"The explanations, however, anticipated by your lordship and by myself were not received, and about three months after the arrival of Sir William at Washington you expressed to me your regret that you had held out expectations which proved unfounded and which had prompted delay, and then for the first time requested an answer to the proposals of Her Majesty's Government, and 'especially to that part of them relating to the arbitration.' It was even then suggested that the answer was desired because it was thought to be appropriate as a matter of form and not because the explanations which had been

waited for were deemed wholly unnecessary. 'I overlooked something due to forms,' is your lordship's language in the note of April 12, 'in my anxiety to promote a clearer understanding, and I eventually learned in an official shape that Her Majesty's Government, following their better judgment, desired, before making any further communication, a reply to their overtures, and especially to that part of them referring to arbitration.' Should the new proffer of arbitration be declined, it was clearly not supposed in your note of February 15 that this result would have any tendency to interrupt Sir William's efforts; but in that event it was hoped, you informed me, that these efforts would result in a settlement agreeable to the United States, inasmuch as in essential points it would carry the treaty of 1850 into operation in a manner practically conformable to the American interpretation of that instrument.

"On the 6th of April I replied to your lordship's note of February 15, with a very frank and full statement of the views of this Government upon all the points to which your lordship had referred. The renewed offer of arbitration mentioned in a dispatch of Lord Clarendon was explicitly declined for the same reasons which had occasioned its rejection before, but an earnest hope was expressed for the success of Sir William Ouseley's mission, and I was instructed formally to request from your lordship those further explanations concerning it which had been promised in Lord Clarendon's note of November 20, for which both your lordship and myself had waited for three months in vain, and which, up to this time, have never been furnished to the American Government. The disappointment which the President felt at some portions of the correspondence which had occurred, and especially at the failure of Her Majesty's Government to inform him more fully than it had done on the subject of the mission, was communicated to your lordship without the least reserve, but in the purposes of that mission, so far as he understood them, I was authorized to say that he fully concurred, and to add his sincere hope that they might be successfully accomplished.

"The President,' I informed you, 'has expressed his entire concurrence in the proposal for an adjustment of the Central American questions which was made to him by your lordship last October, and he does not wish that any delay or defeat of that adjustment shall be justly chargeable to this Government. Since, however, he is asked to co-operate in the arrangements by which it is expected to accomplish it, it is essential that he should know with reasonable accuracy what those arrangements are.' It was in the hope of this adjustment, as well as with a view to the serious consequences which might flow from a naked repeal of the Clayton-Bulwer treaty, that I made the observations on that subject which are contained in my letter to your lordship of April 6. No demand for this abrogation, your lordship is well aware, had then been made by Her Majesty's Government; but

your lordship had several times suggested to me that such an alternative, if proposed by the United States, would be respectfully considered by Great Britain, and in your lordship's belief might in some form or other be finally adopted. You informed me, however, at the same time, that in that event Great Britain would not be inclined to surrender its possessions in Central America, and would certainly continue to occupy the Bay Islands. In reply to this announcement, I informed your lordship that since it is well known that the views of this Government are wholly inconsistent with these pretensions, and that it can never willingly acquiesce in their maintenance by Great Britain, your lordship will readily perceive what serious consequences might follow a dissolution of the treaty, if no provision should be made at the same time for adjusting the questions which led to it.

“‘If, therefore,’ I added, ‘the President does not hasten to consider now the alternative of repealing the treaty of 1850, it is because he does not wish to anticipate the failure of Sir William Ouseley's mission, and is disposed to give a new proof to Her Majesty's Government of his sincere desire to preserve the amicable relations which now happily subsist between the two countries.’

“‘Having thus complied with your lordship's request, and given that formal reply to the overtures embraced in Sir William Ouseley's mission which was desired by Her Majesty's Government, I confidently expected to receive within a reasonable time these additional instructions which appeared to have been delayed for this reply. Such doubtless, was the hope also of your lordship. ‘The discussion has been deferred,’ you informed me in your note of April 12, ‘but the interests at stake have probably not suffered. The results of the negotiation between Nicaragua and the United States are not yet disclosed, and it is probable that Sir William Ouseley may proceed to his destination with more advantage when the nature of those engagements is fully defined.’ ‘If the American Cabinet,’ you also said, ‘as may be inferred from your expressions, be well disposed towards Sir William Ouseley's mission, and will meet Her Majesty's Government in a liberal spirit on matters of secondary moment, that mission may still conduct us to a happy termination.’ In further informing me that my communication would be transmitted to Her Majesty's Government, you added, ‘It remains with Her Majesty's Government to determine whether they can afford the more perfect information desired.’

“‘This was the state of the negotiation in April, 1858. The purposes of Sir William Ouseley's mission had been announced to the American Government and approved; reference had been made by Lord Clarendon to your lordship and Sir William Ouseley for further explanations; these explanations had been asked for from your lordship in repeated interviews, but your lordship had not received the

necessary instructions to make them. At length I had been informed that it was deemed informal to make them until a reply had been received to the general overtures embraced in your previous notes, and especially to that part of them relating to arbitration; this reply had been given, still approving the mission and rejecting the arbitration; and it had been sent to London for the consideration of Her Majesty's Government.

"Under these circumstances, I need not describe to your lordship the surprise with which I received the copy of Lord Malmesbury's dispatch to your lordship, dated at Potsdam, August 18, which you were good enough to inclose to me. In this dispatch, instead of affording any more exact definition of the objects of Sir William Ouseley's mission, your lordship is directed to inform me that Her Majesty's Government 'have, in fact, nothing to add to the explanations given by Sir William and your lordship upon the subject.' As no explanations whatever had been received from either Sir William or yourself since the communication of November 30, it is obvious that his lordship must labor under some misapprehension on this subject; and equally clear is it that when his lordship represents me as having declared in my note of the 6th of April that the Government of the United States would not agree to the abrogation of the Clayton-Bulwer treaty, he has failed to appreciate fully the views of the United States in reference to that abrogation. The declaration in my note of April 6 was certainly not against any abrogation of the treaty, but against considering the expediency of abrogating it at that particular time, and until hopes were at an end of a successful termination of Sir William Ouseley's mission. This waiver of a discussion on the subject of abrogation, in deference to the purposes of that mission, indicated very clearly, it seems to me, how much was expected by this Government from Sir William Ouseley's efforts. Yet even these efforts Lord Malmesbury seems to regard as having been rejected by the United States, and Her Majesty's Government, he concludes, have no alternative but that of leaving to the Cabinet of Washington to originate any further overtures for an adjustment of these controversies.

"Surely, my lord, there must be some grave misapprehension in all this of the views entertained and expressed by this Government upon the proposal embraced in your lordship's note of November 30, or else this Government has labored under an equally serious error as to what was intended by Sir William Ouseley's mission. It is under this impression, and in order to prevent two great nations from failing in their attempts to adjust an important controversy from a mere question of form, or a mere misunderstanding of each other's views, that I have entered into this extended narrative. It is of no small consequence, either to the United States or Great Britain, that these Central American controversies between the two countries should be forever closed.

"On some points of them, and I have been led to hope on the general policy which ought to apply to the whole Isthmian region, they have reached a common ground of agreement.

"The neutrality of the interoceanic routes and their freedom from the superior and controlling influence of any one Government, the principles upon which the Mosquito Protectorate may be arranged, alike with justice to the sovereignty of Nicaragua and the Indian tribes, the surrender of the Bay Islands under certain stipulations for the benefit of trade and the protection of their British occupants, and the definition of the boundaries of the British Belize—about all these points there is no apparent disagreement except as to the conditions which shall be annexed to the Bay Islands' surrender, and as to the limits which shall be fixed to the settlements of the Belize. Is it possible that, if approached in a spirit of conciliation and good feeling, these two points of difference are not susceptible of a friendly adjustment? To believe this would be to underestimate the importance of the adjustment, and the intelligent appreciation of this importance which must be entertained by both nations.

"What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it. This is equally the desire of Great Britain, of France, and of the whole commercial world. If the principles and policy of the Clayton-Bulwer treaty are carried into effect, this object is accomplished. When, therefore, Lord Malmesbury invites new overtures from this Government upon the idea that it has rejected the proposal embraced in Sir William Ouseley's mission for an adjustment of the Central American questions by separate treaties with Honduras, Nicaragua, and Guatemala, upon terms substantially according with the general tenor of the American interpretation of the treaty, I have to reply that this very adjustment is all that the President ever desired, and that instead of having rejected that proposal he had expressed his cordial acceptance of it so far as he understood it, and had anticipated from it the most gratifying consequences.

"Nothing now remains for me but to inquire of your lordship whether the overtures contained in your lordship's note of November 30 are to be considered as withdrawn by Her Majesty's Government, or whether the good results expected in the beginning from Sir William Ouseley's mission may not yet be happily accomplished."

Mr. Cass, Sec. of State, to Lord Napier, Brit. min., Nov. 8, 1858, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 113; 48 Br. & For. State Papers, 732.

"I have to inform your lordship that Her Majesty's Government have received with lively satisfaction the note which General Cass addressed to your lordship on the 8th of November. The friendly tone in which it is written, and the high appreciation which it displays of the importance of terminating the irritating discussions in which both our coun-

tries have been so long involved, cannot but tend to render that termination near at hand and permanent.

"I feel it to be a duty to do justice to the accuracy with which General Cass has recapitulated the circumstances under which the controversy has been sustained, and the efforts hitherto employed to settle it have failed." (Lord Malmesbury to Lord Napier, Dec. 8, 1858, Correspondence, etc., 294.)

In connection with the foregoing note, the following correspondence may be seen in the document just cited: Lord Napier to Lord Clarendon, March 12, and May 6, 1857, pp. 254, 255; Mr. Cass to Lord Napier, May 29, 1857, p. 256; Lord Napier to Mr. Cass, May 31, 1857, p. 152; Mr. Cass to Lord Napier, Oct. 20, 1857, p. 260; Lord Napier to Lord Clarendon, Oct. 22, 1857, p. 261; Lord Napier to Mr. Cass, Nov. 30, 1857, p. 272; Lord Napier to Mr. Cass, Feb. 15, 1858, p. 276; Lord Napier to Lord Malmesbury, March 22, 1858, p. 277; Mr. Cass to Lord Napier, April 6, 1858, p. 109; Lord Malmesbury to Lord Napier, April 8, 1858, p. 279; Lord Malmesbury to Lord Napier, Dec. 8, 1858, p. 294; Lord Napier to Lord Malmesbury, April 4, 1859, p. 125; Lord Malmesbury to Sir W. G. Ouseley, April 30, 1859, p. 126; Lord Lyons to Lord Malmesbury, May 10, 1859, p. 127; Lord Lyons to Lord Malmesbury, May 30, 1859, pp. 127, 128; Lord John Russell to Mr. Wyke, Aug. 15, 1859, p. 130; Mr. Cass to Mr. Dimitry, Sept. 22, 1859, p. 119; Mr. Cass to Mr. Clarke, Oct. 1, 1859, p. 121, and Feb. 18, 1860, p. 124; Lord John Russell to Lord Lyons, Aug. 4, 1860, p. 14.

Further correspondence may be found in the British Blue Book, entitled "Correspondence respecting Central America, 1856-1860."

See, also, Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, confidential, April 7, 1859, MS. Inst. Gr. Br. XVII. 179; same to same, April 12, 1859. The instruction of April 12, 1859, may be found in the Blue Book, p. 215.

For the text of the Dallas-Clarendon convention, Oct. 17, 1856, see Blue Book, 24.

The text of the treaty signed at Washington, Nov. 16, 1857, by Mr. Cass, on the part of the United States, and Señor Yrisarri, on the part of Nicaragua, may be found in the Correspondence in relation to the Proposed Interoceanic Canal, 265. It was in the nature of a general treaty of amity and commerce, with special stipulations in regard to interoceanic transit through the territories of Nicaragua. The United States and their citizens were to enjoy the privileges of such transit, whether by land or by water, on equal terms with the Republic and citizens of Nicaragua. The United States engaged to protect and to "guarantee the neutrality" of all interoceanic routes through the territories in question, and "to employ their influence with other nations to induce them to guarantee such neutrality and protection." Free ports were to be established by Nicaragua at the ends of the routes, and the Government of the United States was to have the unobstructed use of the transit for troops and munitions of war. Nicaragua agreed to employ if necessary her military forces for the security of persons and property in transit, and, on her failure to do so, the United States was to have the right, on notice to the Government of Nicaragua, or to its minister in the United States, to employ military forces for that purpose. Stipulations were also made with a view to prevent the charging of excessive tolls on the routes of interoceanic communication.

The reference made by General Cass, in his note of Nov. 8, 1858, *supra*, to the expeditions of William Walker to Nicaragua, brings into view a subject that tended, probably as much as anything else, to complicate the negotiations for the adjustment of questions growing out of the Clayton-Bulwer treaty, since it served to breed suspicion and to secure for Great Britain the support of France on Central American questions. In an instruction to Mr. Mirabeau B. Lamar, minister of the United States to Central America, July 25, 1858, referring to a recent contract made by M. Belly, a citizen of France, with Costa Rica and Nicaragua, under which important privileges with regard to the canal were to be enjoyed by the French Government, as well as to charges of complicity on the part of American officials with Walker's movements, General Cass said:

"As to the statement it has been thought proper to make that 'all the official agents of the United States in Nicaragua have been the accomplices, and auxiliaries of the invaders,' I know nothing of it, except what is mentioned in this paper, and its position there, in the absence of all proof, is not sufficient to entitle it to confidence. I repeat the assurance already given with relation to yourself that if any of these agents have justly rendered themselves obnoxious to such charges, let the governments, considering themselves injured by their conduct, transmit to this Department specific charges, embodying these or any other accusations with evidence in support of them, and the subject shall receive immediate attention, followed by such action as may be justly called for.

"As to the protectorate which is invoked for the 'independence and nationality of the republics of Nicaragua and Costa Rica,' it is a subject very easily disposed of, so far as the United States have any concern in the question. The President has no belief that either of the Powers, thus publicly and improperly appealed to, has ever given the least encouragement to such a proposition, nor had any reason to anticipate it. The French Government has voluntarily disclaimed any connection with M. Belly, and has given assurances that it has no designs upon Central America, but on the contrary has avoided any interference of that kind. A guarantee for the general use and security of a transit route, and also for its neutrality, is a desirable measure which would meet the hearty concurrence of the United States. These views have already been made known to the governments of Costa Rica and Nicaragua, and they have been informed 'that the President indulges the hope that these routes may yet be considered by general consent as neutral highways for the world, not to be disturbed by the operations of war.' " (MS. Inst. Am. States, XV. 321, 331. Other parts of this instruction may be found in Correspondence (1885), 281, and 50 Br. & For. State Papers, 202.)

Again, in an instruction to Mr. Mason, minister to France, Nov. 26, 1858, General Cass said:

"The general policy of the United States concerning Central America is familiar to you. We desire to see the isthmian routes opened and free for the commerce and intercourse of the world, and we desire to see the States of that region well governed and flourishing and free from the control of all foreign powers. The position we have taken we shall adhere to, that this country will not consent to the resubjugation of those States, or to the assumption and maintenance of any European authority over them.



“The United States have acted with entire good faith in this whole matter. They have done all they could do to prevent the departure of illegal military expeditions with a view to establish themselves in that region, and at this time measures are in progress to prevent the organization and departure of another, which is said to be in preparation. Should the avowed intention of the French and British Governments be carried out and their forces be landed in Nicaragua, the measure would be sure to excite a strong feeling in this country, and would greatly embarrass the efforts of the Government to bring to a satisfactory close these Central American difficulties which have been so long pending.” (MS. Inst. France, XV. 401.)

Dec. 1, 1858, Gen. Cass enclosed to Mr. Lamar memoranda of certain conversations with M. Sartiges, the French minister, as well as with Lord Napier, in regard to Central America. (MS. Inst. Am. States, XVI. 22.)

By these memoranda it appears that on Nov. 8, 1858, Lord Napier informed General Cass that orders had been given to the English naval force in Central America to prevent the landing of filibusters in Nicaragua and Costa Rica, if requested to do so by the governments of those states; and to prevent their landing upon any part of the Mosquito coast or at Greytown, without any application for that purpose from any local authority. Lord Napier also stated that these orders would remain in force during the negotiations of Sir W. Gore Ouseley.

On Nov. 9, the subject was renewed, when General Cass said that the United States objected to the design of the British Government to land forces in any part of Central America, (1) because it would be an exercise of dominion and a palpable violation of the Clayton-Bulwer treaty, and (2) because it would seriously complicate existing difficulties and excite a very strong feeling in the United States. It might, indeed, declared General Cass, be attended with the most serious consequences to the relations of the two countries.

Continuing, the memoranda read as follows:

“Lord Napier maintained the right of the British Government to take this measure, tho’ he agreed that it might be productive of injurious consequences. He stated that he had no authority in the matter, but that he would report the representations I had made to Lord Malmesbury. He avowed his conviction, however, that his Government would inflexibly adhere to the design, as they felt it necessary to afford protection to Sir W. Gore Ouseley, while conducting negotiations with which he had been charged in that quarter. And that this was important to us as well as to England as their object was to make a fair and just treaty, which if effected would go far towards the settlement of the Central American difficulties.

“Nov. 21, 1858.

“M. de Sartiges called to inform me that he had just received a letter from Count Walewski, who informed him that the British Government had applied to the French Government to send some armed vessels to St. Juan del Norte, with orders to land forces, if asked to do so by the Government of Nicaragua, to defeat the projects of the filibusters. The Government of France had assented to this application, and had ordered a naval force there, but M. de Sartiges considered the measure as intended rather as a demonstration, than with a view to actual interference.

“I told M. de Sartiges that I much regretted the course which the French Government had indicated. That it would excite much feeling in this

country, and might still more complicate the existing difficulties in that region. That this Government was doing all in its power to prevent the departure of unlawful warlike expeditions for Nicaragua, and hoped to succeed. That Lord Napier had informed me, a similar measure had been adopted by the British Government, and I had explained to his Lordship the serious objections to it, which were entertained by the United States, arising not only out of general considerations connected with the condition of the Isthmian States, and the peculiar interest the United States had in their progress and condition, but out of the Clayton-Bulwer treaty, which would be violated by such a proceeding on the part of Great Britain.

"I remarked to M. de Sartiges that the United States would regret to learn that any concerted arrangements have been agreed on by Great Britain and France, in relation to those regions. That tho' France was no party to the Clayton-Bulwer treaty, nor bound by its stipulations, and we could not object to her right to guard her interests there, still the position which had been taken by this country against European interference was well known and had become a part of our established policy, and that any concert of action looking to the control of the Isthmus or to a protectorate, as this would be supposed to be, would be peculiarly unacceptable here. That I hoped no action would take place, for if it did it would produce great excitement in this country, and could not fail to call for the attention of the Government. I requested M. de Sartiges to communicate these views to Count Walewski and also to express the hope that the contemplated measure might yet be stopped."

In an instruction to Mr. Lamar, No. 20, March 4, 1859, animadverting upon the non-ratification of the Cass-Yrisarri treaty by Nicaragua, General Cass complained that preference had been given by Nicaragua to a similar treaty with Great Britain. In this relation, Gen. Cass said: "The provision which is contained in the article of the British treaty, No. 22, as transmitted by you, which requires the United States to prevent the fitting out of armed expeditions within our borders to operate against Nicaragua, or to render assistance to any political party in that country, cannot be assented to by this Government. A similar proposal was rejected by the United States when the Cass-Irisarri treaty was negotiated, and was again rejected when proposed by General Jerez as an additional article to the treaty. It involves an offensive doubt whether this government will continue to execute in good faith the neutrality laws of the United States, although such laws have been in existence since the administration of Washington, and have always been scrupulously enforced." (MS. Inst. Am. States, XVI. 32.)

In a later instruction, No. 22, April 1, 1859, General Cass directed Mr. Lamar, if, on receipt of the dispatch, the Nicaraguan Congress had adjourned without ratifying the Cass-Yrisarri treaty, or should have ratified it with the obnoxious additional article on neutrality, or if, the Congress still being in session, the treaty should not be ratified without this obnoxious article within two weeks after the receipt of the despatch, to demand his passports and return home. The Nicaraguan Government was to be informed of this and also of the fact that unless its whole course towards the United States was at once changed and reasonable redress made for injuries to citizens of the United States, the President would regard all peaceful negotiations with Nicaragua as at an end and recommend to Congress to seek redress by force. (MS. Inst. Am. States, XVI. 36.)

Before this instruction was written, Mr. Lamar had concluded a treaty with Nicaragua which was a transcript of the Cass-Yrisarri treaty, with the addition of the modifications which Nicaragua had proposed. Mr. Lamar stated that his motive for so doing was that Sir W. Gore Ouseley had adopted these very modifications, and he thought the United States might on reconsideration accept them, since otherwise no treaty could be made. (MSS. Dept. of State.)

As to Walker's expeditions, see Mr. Cass, Sec. of State, to Mr. Molina, Nicaraguan min., Nov. 26, 1860, MS. Notes to Cent. Am. I. 177.

The British Government disapproved the insertion by Sir W. Gore Ouseley, in his treaty with Nicaragua, of an engagement on the part of that Government to prevent the organization of filibustering expeditions in British territory against Nicaragua, and declined to ratify the treaty, not only because the article had "no real meaning so far as Great Britain and Nicaragua are concerned, except as a simple concession," but also because it had been used by Nicaragua as the basis of an attempt to require a similar concession from the United States. (Lord J. Russell to Sir C. L. Wyke, Aug. 15, 1859, Cor. in relation to the Proposed Interoceanic Canal, 130; 50 Br. & For. State Papers, 267.)

"You will impress upon Count Walewski that we want nothing of Nicaragua which is not honorable to her, and which we have not a fair right to demand. We shall, under no circumstances, abandon the determination that the transit routes across the Isthmus shall be kept open and safe for all commercial nations." (Mr. Cass, Sec. of State, to Mr. Mason, Apr. 12, 1859, MS. Inst. France, XV. 412.)

With regard to the proposal of arbitration, it may be stated that it was suggested by Lord Clarendon to Mr. Buchanan in a conversation in November 1854. Mr. Buchanan, in reply, "playfully observed that it would now be difficult to find an impartial umpire, as they had gone to war with our arbitrator, the Emperor of Russia." The subject was again mentioned by Lord Clarendon a year later, when Mr. Buchanan made the same reply. Neither Mr. Buchanan nor his Government regarded Lord Clarendon's remarks as intended to convey a formal offer of arbitration; and it appears that Mr. Crampton, who had been directed to make such an offer, overlooked that part of his instructions and failed to communicate it till the end of February 1856. (Blue Book, Correspondence with the United States respecting Central America, 1856, 296-303.)

The subject was renewed by Mr. Crampton's successor at Washington, Lord Napier, who stated to Mr. Cass officially, although not instructed to do so, that her Majesty's Government "regarded the principle of arbitration as the ark of safety for nations differing as to the sense of treaties," and that he did not doubt that his Government "would gladly refer the decision of all controverted points to the decision of any one of the European powers." General Cass, as reported by Lord Napier, answered that he "did not repudiate the principle of arbitration on all occasions; he had invoked it, and would do so again where it seemed justly applicable;" but that in the pending matter it was declined by the United States because, in the first place, the language of the treaty was so clear that in his opinion there ought not to be two opinions about it. "We say black is black," remarked Gen. Cass, "but we think that you say that black is white." Besides, said Gen. Cass, it was a mere question of the interpretation of the English language, concerning which no foreign government was so competent to decide as the United States and

England, who possessed that language in common; and, finally, the Senate of the United States had accepted the treaty in the sense that it stipulated for the absolute withdrawal of all British protectorate or possession in Central America. He had himself separated from some of his party and voted for the measure on that understanding, and on no other would the treaty have had a voice in the Senate or in the country. (Blue Book, Correspondence respecting Central America, 1856-60, 62-63.)

#### 4. ARRANGEMENT OF 1858-1860.

#### § 356.

By a convention between Great Britain and Honduras, signed by Sir Charles Lennox Wyke and Señor don Francisco Cruz at Comayagua, November 28, 1859, Great Britain recognized the sovereignty of Honduras over the Bay Islands and over the district occupied by the Mosquito Indians within the frontier of Honduras, whatever that frontier might be. Provision was at the same time made for the preservation of any interests of British subjects by grant, lease, or otherwise, obtained from the Mosquito Indians in lands situated within the district in question, and, in order that this stipulation might be made effective, provision was made for the appointment of a mixed commission to investigate the claims of British subjects arising out of grants, or leases, or otherwise.

49 Brit. & For. State Papers, 13.

For a further account of this treaty and the proceedings of the mixed commission, see Moore, *Int. Arbitrations*, II. 2106.

"Aside from the well understood doctrines of this Government as to any new acquisitions of American territory by European powers, it seems unquestionable that the Clayton-Bulwer treaty precludes the acquisition of those islands by Great Britain. The intentions which are imputed, therefore, to that power, looking in that direction may well be discredited. Still they should awaken the attention and arouse the vigilance of this Government. Even should the tendency you report toward the alienation of the Bay Islands take another direction, it would, of course, be impossible for us to remain indifferent or to acquiesce in any other European power acquiring any of them." (Mr. Evarts, Sec. of State, to Mr. Logan, Mar. 4, 1880. *MS. Inst. Cent. Am.* XVIII. 73.)

By a convention between Great Britain and Nicaragua, signed by Sir Charles Lennox Wyke and Señor Pedro Zeledon, at Managua, January 28, 1860, Great Britain recognized the sovereignty of Nicaragua over the district occupied by the Mosquito Indians "within the frontier of that republic." The convention looked to the ultimate formal incorporation of the Mosquito Indians into the Republic of Nicaragua, and provided for the preservation of the rights of British subjects to lands within the district under grants or leases from the Mosquito Indians.

50 Brit. & For. State Pap. 96; Moore, *Int. Arbitrations*, II. 2106.

For the Wyke-Aycinena convention between Great Britain and Honduras, signed at Guatemala, April 30, 1859, see Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 294.

For an explanation of the failure of Sir William Gore Ouseley's mission, and the instructions given by Lord John Russell, Aug. 15, 1859, to Sir William's successor, Sir Charles Lennox Wyke, by whom the treaties above mentioned were concluded, see Correspondence (1885), 130; 50 Br. & For. State Papers (1859, 1860), 267. See, also, Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, Aug. 11, and Aug. 12, 1859, MS. Inst. Gr. Br. XVII. 208, 209, urging the importance of a speedy settlement.

With reference to the mission of Sir C. L. Wyke, see Mr. Cass, Sec. of State, to Mr. Clarke, min. to Cent. Am., Oct. 1, 1859, and Feb. 18, 1860, Correspondence, &c., 121, 124; Mr. Cass, Sec. of State, to Lord Lyons, confidential, Feb. 21, 1860, MS. Notes to Gr. Br. VIII. 287.

"Our relations with Great Britain are of the most friendly character. Since the commencement of my Administration the two dangerous questions arising from the Clayton and Bulwer treaty and from the right of search claimed by the British Government have been amicably and honorably adjusted.

"The discordant constructions of the Clayton and Bulwer treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government. In my last annual message I informed Congress that the British Government had not then 'completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two Governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished.' This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 28th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate. Besides, by the former the Bay Islands are recognized as a part of the Republic of Honduras. It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted by the Senate of the United States to the treaty concluded at London on the 17th October, 1856, between the two Governments. It will be recollected that this treaty was rejected by the British Government because of its objection to the just and important amendment of the Senate to the article relating to Ruatan and the other islands in the Bay of Honduras."

President Buchanan, annual message, Dec. 3, 1860. (Richardson's Messages and Papers, V. 639.)

5. MR. SEWARD'S COURSE.

§ 357.

"It is the policy of the United States Government to keep the Nicaragua transit open to the commerce of the world, and to discourage its interruption by the visionary schemes of adventurers."

Mr. Seward, Sec. of State, to Mr. Riotte, No. 60, Sept. 8, 1863, MS. Inst. Am. States, XVI. 367.

As to Mr. Seward's action in 1862, with reference to the Panama route, see *supra*, § 339.

By Art. XIV. of the Clay-Colindres treaty, between the United States and Honduras, concluded at Comayagua, July 4, 1864, stipulations, similar in terms to those embodied in Art. XXXV. of the treaty of 1846 with New Granada, were made with reference to interoceanic routes in Honduras, and particularly to the way to be constructed by the Honduras Inter-oceanic Railway Company. The guarantee thus given does not imply "that the United States are to maintain a police or other force in Honduras for the purpose of keeping petty trespassers from the railway." (Mr. Fish, Sec. of State, to Mr. Baxter, min. to Honduras, May 12, 1871, For. Rel. 1871, 581; Mr. Fish, Sec. of State, to Mr. Torbert, min. to Salvador, March 20, 1871, For. Rel. 1871, 691.)

"It seems obvious that the renunciation by the parties to this instrument [the Clayton-Bulwer treaty] of a right to acquire dominion in Central America was intended to prevent either of them from obtaining control over the proposed ship-canal. At the time the treaty was concluded, there was every prospect that that work would not only soon be begun, but that it would be carried to a successful conclusion. For reasons, however, which it is not necessary to specify, it never was even commenced, and at present there does not appear to be a likelihood of its being undertaken. It may be a question, therefore, supposing that the canal should never be begun, whether the renunciatory clauses of the treaty are to have perpetual operation.

"Technically speaking, this question might be decided in the negative. Still, so long as it should remain a question, it would not comport with good faith for either party to do anything which might be deemed contrary to even the spirit of the treaty.

"It is becoming more and more certain every day that not only naval warfare in the future, but also all navigation of war vessels in time of peace must be by steam. This necessity will occasion little or no inconvenience to the principal maritime powers of Europe, and especially to Great Britain, as those powers have possessions in various parts of the globe where they can have stores of coal and provisions for the use of their vessels. We are differently situated. We have no possession beyond the limits of the United States. Foreign colonization has never been favored by statesmen in this country either on general grounds, or as in harmony with our peculiar condi-

Suggestion as to  
Tigre Island.

tion. There is no change or likely to be any in this respect. It is indispensable for us, however, to have coaling stations under our own flag for naval observation and police, and for defensive war as well as for the protection of our widely-spread commerce when we are at peace ourselves. This want, even for our commercial marine, is nowhere more sensibly felt than on the track between Panama and San Francisco. The question then occurs what points beyond our jurisdiction would be most eligible for this purpose?

"Whatever opinion might be entertained in regard to any other sites, there would be no question that Tigre Island would be exceedingly desirable for that purpose.

"Under these circumstances, you will sound Lord Clarendon as to the disposition of his Government to favor us in acquiring coaling stations in Central America, notwithstanding the stipulation contained in the Clayton-Bulwer treaty. In doing this, however, you will use general terms only, and will by no means allow it to be supposed that we particularly covet Tigre Island. You will execute this instruction at such time and in such way as to you may seem best, and inform the Department of the result so that the United States minister to Honduras may be directed to proceed accordingly.

"It is supposed that you may probably be able to introduce the subject to the Earl of Clarendon's attention by suggesting that a negotiation with a view to the special end mentioned might be made an element in a general negotiation for settlement of the northwest-boundary question and of the conflicting claims of the two countries which have arisen during the late rebellion in the United States."

Mr. Seward, Sec. of State. to Mr. Adams, min. to England, April 25, 1866, Correspondence in relation to the Proposed Interoceanic Canal (*Washington*, 1885), 14.

Mr. Adams, June 2, 1866, answered that he had in a casual way brought the subject to the attention of Lord Clarendon, who stated that he would refresh his recollection of the Clayton-Bulwer treaty and "look the whole thing over." (*Correspondence, etc.* (1885), 15.)

June 12, 1867, Mr. Seward enclosed to Mr. Adams a copy of a dispatch just received from Mr. Rousseau, United States minister resident in Honduras, in relation to the desire of the United States to obtain Tigre Island as a coaling station. Accompanying the dispatch was a map. Mr. Adams was instructed to bring the matter, in such manner as his discretion might approve, to the attention of Lord Stanley. (*MS. Inst. Gr. Br. XXI.* 219.)

June 21, 1867, Mr. Seward being Secretary of State, a treaty, commonly called the Dickinson-Ayon treaty, was concluded between the United States and Nicaragua, containing stipulations similar to those embodied in the unratified Cass-Yrisarri agreement. The ratifications of the treaty were exchanged at Granada, June 20, 1868. By Article XIV., Nicaragua grants "to the United States, and to their

*Treaty with Nicaragua, 1867, and other treaties.*

citizens and property, the right of transit between the Atlantic and Pacific Oceans through the territory of that Republic, on any route of communication, natural or artificial, whether by land or by water," on the same terms as it should be enjoyed by Nicaragua and its citizens, "the Republic of Nicaragua, however, reserving its rights of sovereignty over the same." By the next article, the United States "agree to extend their protection to all such routes of communication as aforesaid, and to guarantee the neutrality and innocent use of the same. They also agree to employ their influence with other nations to induce them to guarantee such neutrality and protection."

Treaty Volume (1776-1887), 779, 784-786. The treaty of peace and friendship between Spain and Nicaragua of July 25, 1850, provides (Article XIII.) that the former power shall "enjoy on the transit the same advantages and exemptions as are granted to the most favored nation," and shall, on the other hand, guarantee its "neutrality," in order "to keep the transit thereby free" and "protect it against all embargo or confiscation;" and the treaty between Spain and Costa Rica of May 10, 1850, grants (Article XIII.) to the Spanish flag and merchandise "free transit" upon any canal through the territory of Costa Rica on the same terms as "the vessels, merchandise, and citizens" of the latter country. (39 Br. & For. State Papers, 1345; 42 id. 1210.) By Articles XXVII.-XXXIII. of the treaty of amity, commerce, and navigation, between France and Nicaragua, of April 11, 1859, the neutrality and free use of the canal are amply guaranteed. (50 Br. & For. State Papers, 363, 373.) The treaty of commerce between Great Britain and Nicaragua of February 11, 1860, contained similar stipulations; but it expired June 11, 1888, on notice given in conformity with its terms. (78 Br. & For. State Papers, 562.) The treaty between Italy and Nicaragua of March 6, 1868, provides for most-favored nation treatment in respect of "navigation," as well as of commerce. (58 Br. & For. State Papers, 546.)

See Mr. Cárdenas, Nicaraguan min., to Mr. Fish, Sec. of State, Jan. 25, 1877, referring the foregoing treaties. (Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 134, 135.)

#### 6. NEGOTIATIONS OF MR. FISH.

##### § 358.

"You are fully aware of the great interest which this Government has already taken in the question of a water communication across or near the Isthmus of Darien, and of the large expenditure it has made in the surveys for ascertaining the most practicable route. The President has taken the most lively interest in this object, and I am safe in saying that scarce any one object has more earnestly engaged his sympathy. He has encouraged and authorized the prosecution of official surveys, and, as you are no doubt aware, referred all the reports of the various surveys to a board consisting of General Humphreys, Chief of Engineers, United States Army; Commodore Ammen, Chief of the Bureau of Navigation, United States Navy; and Captain Patterson, Superintendent of the Coast Survey. He personally and care-



fully examined all these reports, and that of the board; which latter reached the conclusion that the Nicaragua route presented the most practicable if not the only feasible means of accomplishing the desired object. . . .

"The interest of the President and of the people of the United States in the construction of a canal connecting the two oceans is, however, so great that, although it cannot entertain the irregular suggestions reported in your interesting despatch, should a proposition or request be authoritatively made by the Maritime Powers, or by any of the prominent ones, requesting the United States to unite by the appointment of an engineer to cooperate with others officially appointed or recognized, in the survey of the alleged route, the President will not hesitate to respond to the request. It is possible that he might also authorize the Navy to render such aid as may be within its power; the decision on this point, however, is reserved until the question arises. But in the present aspect of the subject, and under the presentation in which it is brought to the attention of this Government, it is simply a private enterprise, not without the suspicion of being brought forward in antagonism and for the purpose of embarrassing and of delaying the execution of a canal, on the plan which the official reports of the surveys, and of the very elaborate and scientific explorations made by this Government, had indicated as practicable.

"A Darien canal should not be regarded as hostile to a Suez Canal; they will be, not so much rivals, as joint contributors to the increase of the commerce of the world, and thus mutually advance each other's interests. The successful construction of the Darien canal will really add to the glory of the originator of the Suez Canal. . . .

"We shall . . . be glad of any movement which shall result in the early decision of the question of the most practicable route, and the early commencement and speedy completion of an interoceanic communication, which shall be guaranteed in its perpetual neutralization and dedication to the commerce of all nations, without advantages to one over another of those who guarantee its assured neutrality. In this connection I would call your attention to the fact that the mere guarantee of neutrality of a canal and of a belt of contiguous territory will be of little practical value, unless the waters of the high seas, for a radius of reasonably large extent around the termini on either ocean, be also made neutral waters, so far as relates to vessels navigating or designing to enter the canal are concerned, in order to prevent a blockade at the mouth, by one belligerent of vessels belonging to another belligerent, and to allow a reasonable chance for the vessels of a belligerent to enter, or to escape from the canal, at a distance beyond the mere limits of jurisdictional waters."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, Nov. 13, 1876,  
MS. Inst. France. XIX. 413-414, 418-420.

The enterprise above referred to was that of Mr. de Gogorza.

In the closing months of President Grant's Administration a step was taken in the direction of effecting a final adjustment of the canal question on the lines of perfect neutralization. As appears by a circular of Mr. Fish, then Secretary of State, to United States ministers, of February 28, 1877, a draft treaty was prepared, "to which it was proposed to obtain the accession of the principal maritime powers." The negotiations failed owing to certain views of Nicaragua, which were neither satisfactory to the United States nor calculated to obtain the "cooperation" of those powers. By the draft treaty, every power becoming a party to its "stipulations and guarantees" was "at all times, whether in peace or war," to have "the right of transit" through the canal when constructed, as well as "the benefit of the neutral waters at the ends thereof for all classes of vessels entitled to fly their respective flags with the cargoes on board, on equal terms in every respect as between each other;" and "the vessels of war and other national vessels" of such powers were to have "the right of transit through the canal."

Mr. Fish, Sec. of State, to United States ministers, circular, Feb. 28, 1877, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 134-151, where correspondence with the Nicaraguan minister at Washington and drafts and counterdrafts of the proposed treaty may be found. Mr. Fish's original draft is at p. 146.

In certain remarks accompanying a note to the Nicaraguan minister of Feb. 16, 1877, Mr. Fish, commenting on a counter memorandum of Nicaragua, said:

"The obligations of the Clayton-Bulwer treaty, including that which provides for an invitation to other powers to join in guaranteeing the neutrality [of the canal], are still subsisting. This Government has hitherto abstained from making a proposition on the subject to other powers, because there has been no prospect of a completion, or even of a commencement of the canal. Having already entered into the stipulation with Great Britain, and that still being in force, its repetition in a treaty with Nicaragua might imply a doubt of the good faith of the United States on the subject." (Id. 145.)

In 1876, Mr. Fish entered into negotiations with Mr. Peralta, the Costa Rican minister at Washington, with a view to conclude a treaty on the subject of a ship canal, and to that end presented to the minister a memorandum embodying as the basis of an agreement the same general principles as were afterwards laid down in the negotiations with the Nicaraguan minister. June 26, 1876, Mr. Peralta indicated that the continued misunderstanding between his country and Nicaragua in regard to their boundary was likely to delay any arrangement with regard to the work in question. (Mr. Fish, Sec. of State, to Mr. Peralta, March 28, and July 11, 1876, MS. Notes to Costa Rica, II. 14, 17.)

"We have made several attempts at negotiation with both Nicaragua and Colombia on the subject of an interoceanic canal. They have failed mostly through the indisposition of the governments of those countries to grant terms which would command the confidence of capitalists. This policy on their part tends to confirm the opinion which you express that Nicaragua at least does not desire a canal through her territory." (Mr. F. W. Seward, Act. Sec. of State, to Mr. Williamson, min. to Costa Rica, Nov. 27, 1878, MS. Inst. Costa Rica, XVII. 383.)

## 7. MESSAGES OF PRESIDENT HAYES.

## § 359.

“The question of an interoceanic canal has recently assumed a new and important aspect and is now under discussion with the Central American countries through whose territory the canal, by the Nicaragua route, would have to pass. It is trusted that enlightened statesmanship on their part will see that the early prosecution of such a work will largely inure to the benefit, not only of their own citizens and those of the United States, but of the commerce of the civilized world. It is not doubted that should the work be undertaken under the protective auspices of the United States, and upon satisfactory concessions for the right of way and its security by the Central American Governments, the capital for its completion would be readily furnished from this country and Europe, which might, failing such guarantees, prove inaccessible.”

President Hayes, annual message, Dec. 1, 1879. (Richardson's Messages and Papers, VII. 569.)

“The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power, or to any combination of European powers. If existing treaties between the United States and other nations, or if the rights of sovereignty or property of other nations stand in the way of this policy—a contingency which is not apprehended—suitable steps should be taken by just and liberal negotiations to promote and establish the American policy on this subject, consistently with the rights of the nations to be affected by it.

“The capital invested by corporations or citizens of other countries in such an enterprise must, in a great degree, look for protection to one or more of the great powers of the world. No European power can intervene for such protection without adopting measures on this continent which the United States would deem wholly inadmissible. If the protection of the United States is relied upon, the United States must exercise such control as will enable this country to protect its national interests and maintain the rights of those whose private capital is embarked in the work.

“An interoceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States. Our merely commercial interest in it is greater than that of all other countries, while its relations to our power and prosperity as a nation, to our means of defense, our unity, peace, and safety, are matters of paramount concern to the people of the United

States. No other great power would, under similar circumstances, fail to assert a rightful control over a work so closely and vitally affecting its interest and welfare.

"Without urging further the grounds of my opinion, I repeat, in conclusion, that it is the right and the duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests. This I am quite sure will be found not only compatible with, but promotive of, the widest and most permanent advantage to commerce and civilization."

President Hayes, message of March 8, 1880, S. Ex. Doc. 112, 46 Cong. 2 sess.; H. Ex. Doc. 47, 46 Cong. 2 sess.; Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 3. See, also, the report of Mr. Evarts, Sec. of State, accompanying the President's message, and expressing similar views. Mr. Evarts refers to the Wyse concession, at Panama, as the occasion for considering the relation of the United States to the subject of interoceanic communication across the American Isthmus.

#### 8. DISCUSSIONS OF 1881-1883.

##### § 360.

Mr. Blaine, in an instruction to Mr. Lowell, minister to England, June 24, 1881, referring to a report "that the great powers of Europe may possibly be considering the subject of jointly guaranteeing the neutrality of the interoceanic canal" then projected across the Isthmus of Panama, declared that, in the opinion of the President, the guarantee given by the United States to New Granada, by Art. XXXV. of the treaty of 1846, did not require "reinforcement, or accession, or assent from any other power," and that any attempt to "supersede" it, by "an agreement between European powers," would "partake of the nature of an alliance against the United States, and would be regarded by this Government as an indication of unfriendly feeling." Mr. Lowell was further instructed to be careful, in any conversations which he might have, not to represent this position as the development of a new policy or as the inauguration of any advanced, aggressive steps to be taken by the United States, since it was "nothing more than the pronounced adherence of the United States to principles long since enunciated by the highest authority of the Government, and now, in the judgment of the President, firmly interwoven as an integral and important part of our national policy."

Mr. Blaine, Sec. of State, to Mr. Lowell, min. to England, June 24, 1881, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 322. See the text of the instruction more fully given, *supra*, § 339.

The foregoing instruction was prompted by a report, by the United States minister at Bogota, that it had privately but with every appearance of

trustworthiness come to his knowledge that the Colombian Government had decided to make overtures, through its ministers at London and Paris, to the Governments of Great Britain and France, and also to those of Germany, Spain, and Italy, inviting them to join in the execution of a treaty guaranteeing the neutrality of the Isthmus of Panama, and the sovereignty of Colombia over that territory. (Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Austria-Hungary, June 25, 1881, MS. Inst. Aust.-Hungary, III. 172.)

The instruction was communicated to the cabinets of London, Paris, Berlin, and Vienna, and, by mistake, to that of Brussels. (Mr. Blaine, Sec. of State, to Mr. Putnam, min. to Belgium, Aug. 1, 1881, MS. Inst. Belg. II. 270.)

For the reply of Lord Granville, see *supra*, § 339.

Referring to his instruction of June 24, 1881, Mr. Blaine addressed to Mr. Lowell, Nov. 19, 1881, a further instruction specifically relating to the Clayton-Bulwer treaty, a treaty made, said Mr. Blaine, "more than thirty years ago, under exceptional and extraordinary conditions which have long ceased to exist—conditions which at best were temporary in their nature, and which can never be reproduced." Mr. Blaine objected to the "perpetuity" of the treaty on the ground (1) that it bound the United States "not to use its military force in any precautionary measure," while it left "the naval power of Great Britain perfectly free and unrestrained; ready at any moment of need to seize both ends of the canal, and render its military occupation on land a matter entirely within the discretion of her Majesty's Government;" (2) that it embodied "a misconception of the relative positions of Great Britain and the United States with respect to the interests of each Government in questions pertaining to this continent," and impeached "our right and long-established claim to priority;" (3) that it gave the same right through the canal to a war ship, bent upon an errand of destruction to the United States coasts, as to a vessel of the American navy sailing for their defense, and that the United States demanded, for its own defense, the right to use only the same provision as Great Britain so emphatically employed, in respect of the Suez route, by the possession of strategic and fortified posts and otherwise, for the defense of the British Empire; (4) that, only by the supervision of the United States, could the Isthmian canal "be definitely and at all times secured against the interference and obstruction incident to war;" (5) that "a mere agreement of neutrality on paper between the great powers of Europe might prove ineffectual to preserve the canal in time of hostilities," and that if, in the event of a general European war, one of their naval powers should seize it, the United States might be obliged to enter upon a "defensive and protective war" in order to support her own commerce; (6) that, while the European powers had often engaged with one another in war, "in only a single instance in the past hundred years" had the United States "exchanged a hostile shot" with any of them, and that,

as it was improbable that "for a hundred years to come" such an incident would be repeated, the "one conclusive mode" of preserving the neutrality of the canal was to place it under the control of the United States, as the government "least likely to be engaged in war, and able, in any and every event, to enforce the guardianship which she shall assume;" (7) that, since the treaty was made, the number of French and German vessels frequenting the Central American coasts had greatly and relatively increased; (8) that the expected aid in the construction of the canal from British capital, which the treaty was designed to secure, had not been realized, and that, owing to the great development of the United States, foreign capital could not in future enter as an essential factor into the determination of the problem. In conclusion, Mr. Blaine said:

"It is earnestly hoped by the President that the considerations now presented will have due weight and influence with Her Majesty's Government, and that the modifications of the treaty desired by the United States will be conceded in the same friendly spirit in which they are asked. The following is a summary of the changes necessary to meet the views of this Government:

"First. Every part of the treaty which forbids the United States fortifying the canal and holding the political control of it in conjunction with the country in which it is located to be canceled.

"Second. Every part of the treaty in which Great Britain and the United States agree to make no acquisition of territory in Central America to remain in full force. As an original proposition, this Government would not admit that Great Britain and the United States should be put on the same basis, even negatively, with respect to territorial acquisitions on the American continent, and would be unwilling to establish such a precedent without full explanation. But the treaty contains that provision with respect to Central America, and if the United States should seek its annulment, it might give rise to erroneous and mischievous apprehensions among a people with whom this Government desires to be on the most friendly terms. The United States has taken special occasion to assure the Spanish-American republics to the south of us that we do not intend and do not desire to cross their borders or in any way disturb their territorial integrity, and we shall not willingly incur the risk of a misunderstanding by annulling the clauses in the Clayton-Bulwer treaty which forbid such a step with Central America. The acquisition of military and naval stations necessary for the protection of the canal and voluntarily ceded to the United States by the Central American States not to be regarded as a violation of the provisions contained in the foregoing.

"Third. The United States will not object to maintaining the clause looking to the establishment of a free port at each end of whatever canal may be constructed, if England desires it to be retained.

"Fourth. The clause in which the two governments agreed to make treaty stipulations for a joint protectorate of whatever railway or canal might be constructed at Tehuantepec or Panama has never been perfected. No treaty stipulations for the proposed end have been suggested by either party, although citizens of the United States long since constructed a railway at Panama, and are now engaged in the same work at Tehuantepec. It is a fair presumption, in the judgment of the President, that this provision should be regarded as obsolete by the nonaction and common consent of the two governments.

"Fifth. The clause defining the distance from either end of the canal where in time of war captures might be made by either belligerent on the high seas was left incomplete, and the distance was never determined. In the judgment of the President, speaking in the interest of peaceful commerce, this distance should be made as liberal as possible, and might, with advantage, as a question relating to the high seas and common to all nations, be a matter of stipulation between the great powers of the world.

"In assuming as a necessity the political control of whatever canal or canals may be constructed across the Isthmus, the United States will act in entire harmony with the governments within whose territory the canals shall be located. Between the United States and the other American republics there can be no hostility, no jealousy, no rivalry, no distrust. This government entertains no design in connection with this project for its own advantage which is not also for the equal or greater advantage of the country to be directly and immediately affected. Nor does the United States seek any exclusive or narrow commercial advantage. It frankly agrees and will by public proclamation declare at the proper time, in conjunction with the republic on whose soil the canal may be located, that the same rights and privileges, the same tolls and obligations for the use of the canal, shall apply with absolute impartiality to the merchant marine of every nation on the globe. And equally in time of peace, the harmless use of the canal shall be freely granted to the war vessels of other nations. In time of war, aside from the defensive use to be made of it by the country in which it is constructed and by the United States, the canal shall be impartially closed against the war vessels of all belligerents.

"It is the desire and determination of the United States that the canal shall be used only for the development and increase of peaceful commerce among all the nations, and shall not be considered a strategic point in warfare which may tempt the aggression of belligerents or be seized under the compulsions of military necessity by any of the great powers that may have contests in which the United States has no stake and will take no part.

"If it be asked why the United States objects to the assent of European governments to the terms of neutrality for the operation of the canal, my answer is that the right to assent implies the right to dissent, and thus the whole question would be thrown open for contention as an international issue. It is the fixed purpose of the United States to confine it strictly and solely as an American question, to be dealt with and decided by the American Government.

"In presenting the views contained herein to Lord Granville, you will take occasion to say that the Government of the United States seeks this particular time for the discussion as most opportune and auspicious. At no period since the peace of 1783 have relations between the British and American Governments been so cordial and friendly as now. And I am sure Her Majesty's Government will find in the views now suggested and the propositions now submitted additional evidence of the desire of this Government to remove all possible grounds of controversy between two nations which have so many interests in common and so many reasons for honorable and lasting peace.

"You will, at the earliest opportunity, acquaint Lord Granville with the purpose of the United States touching the Clayton-Bulwer treaty, and in your own way you will impress him fully with the views of your Government.

"I refrain from directing that a copy of this instruction be left with his lordship, because in reviewing the case I have necessarily been compelled, in drawing illustrations from British policy, to indulge somewhat freely in the *argumentum ad hominem*.

"This course of reasoning in an instruction to our own minister is altogether legitimate and pertinent, and yet might seem discourteous if addressed directly to the British Government. You may deem it expedient to make this explanation to Lord Granville, and if, afterward, he shall desire a copy of this instruction, you will of course furnish it."

Mr. Blaine, Sec. of State, to Mr. Lowell, min. to England, No. 270, Nov. 19, 1881, Correspondence (1885), 327; For. Rel. 1881, 554.

In another instruction to Mr. Lowell, Nov. 29, 1881, Mr. Blaine reviewed the discussions as to the Clayton-Bulwer treaty from 1850 to 1858, as they appear in the correspondence given above, and particularly in Mr. Cass' note of Nov. 8, 1858, to Lord Napier, *supra*, § 355. (Correspondence, 333; For. Rel. 1881, 563.)

"Lord Granville was, as usual, exceedingly courteous and friendly, but made no remark except that the publication of No. 270, before an opportunity was given him of replying to it, 'seemed to him, to say the least, unusual.'" (Mr. Lowell to Mr. Blaine, Dec. 27, 1881, Correspondence, 339.)



Lord Granville's reply to Mr. Blaine's papers of November, 1881, is contained in two instructions addressed to the British minister at Washington, and dated respectively January 7 and January 14, 1882. In the first of these notes Lord Granville's reply.

Granville declared that Her Majesty's Government could not admit that the analogy, which was sought to be drawn from the conduct of Great Britain in regard to the Suez Canal, was correct or justified by the facts, especially as that Government had never tried to restrict the use of the canal by the naval forces of other countries; that, when the Clayton-Bulwer treaty was made, and even when President Monroe published his message of 1823, there was a clear prevision of the great future reserved to the Pacific coast; that Great Britain had large colonial possessions, no less than great commercial interests, which rendered interoceanic communication a matter for her also of the greatest importance; that in her opinion such communication concerned not merely the United States or the American continent, but, as was recognized by Article VI. of the Clayton-Bulwer treaty, the whole civilized world, and that she would not oppose or decline any discussion for the purpose of securing on a general international basis its universal and unrestricted use; that, if provision should be made on the one side for a different state of affairs, it would find its natural and logical counterpart on the other; that Her Majesty's Government could conceive no more melancholy spectacle than a competition among the nations holding West Indian possessions and others on the American continent in the construction of fortifications to obtain command over the canal and its approaches; and that, when the claim to do this was accompanied by a declaration that the United States would insist on treating the canal "as part of her coast line," it was difficult to imagine that the states to which the territory lying between that waterway and the United States belonged, could practically retain their independent position. As against these consequences, which would almost certainly follow from a claim on the part of the United States to assume the supreme authority over the canal and all responsibility for its control, Her Majesty's Government, said Lord Granville, held that the principles which guided the negotiators of the treaty of 1850 were intrinsically sound and continued to be applicable to the later state of affairs. He added that an extension to all maritime states of the invitation contemplated by the treaty of 1850 would obviate any objection that the treaty was not adequate, in its present condition, for the purpose for which it was designed. In this relation he referred to Mr. Fish's circular of 1877.

In his instruction of January 14, 1882, Lord Granville entered into an extended review of the discussions relating to the Clayton-Bulwer treaty and maintained (1) that those differences, which had "long since been happily disposed of," did not relate to the general principles to be observed in regard to interoceanic communication, but to terri-

torial questions; (2) that Mr. Blaine's proposal to retain that part of the treaty which prohibited the two governments from acquiring territory in Central America, but to cancel the parts that forbade either contracting party to fortify the canal and hold political control of it, was distinctly at variance with the declarations of the United States while the controversy lasted; (3) that the United States did not then seek to limit the principle of neutralization so as to exclude Colombian or even Mexican territory, or urge that its application would be inconsistent with the treaty between the United States and New Granada of 1846; (4) that, when the controversies concerning the Clayton-Bulwer treaty were in progress, the British Government was led to contemplate the abrogation of the treaty, on condition of reverting to the state of things before its conclusion; (5) that this solution, as the United States then pointed out, would have been fraught with danger to the good relations between the two countries, and that by the voluntary action of Great Britain the points in dispute were practically conceded to the United States, and a settlement reached which was declared by President Buchanan to be entirely satisfactory and which had for twenty years remained undisputed.

Lord Granville to Mr. West, January 7, 1882, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 340; same to same, January 14, 1882, *id.* 843.

These two papers may also be found in *For. Rel.* 1882, 302, 305.

A reply to Lord Granville's two papers was made by Mr. Frelinghuysen in an instruction to Mr. Lowell, May 8, 1882. In this instruction Mr. Frelinghuysen maintained that the Clayton-Bulwer treaty was concluded to secure a thing which did not then exist and which was no longer capable of existing, namely, the construction of a canal under the grant from Nicaragua of 1849; that, in order to secure this, the United States consented to waive the exclusive and valuable rights which had been offered to it, and agreed with Great Britain not to occupy, fortify, colonize or assume dominion over any part of Central America; that the United States was not called upon by any principle of equity to revive those provisions of the treaty which specially related to the concession of 1849 and apply them to any concession since made; that, in view of the development of the United States, the need of foreign capital for the construction of the canal no longer existed, and that the United States held itself free to protect any interoceanic communication in which its government or citizens might become interested under agreements with the local sovereign powers; that the President was still ready, on the part of the United States, to agree that the reciprocal engagements of 1850 respecting the acquisition of territory in Central America and the

establishment of a free port at each end of the canal should continue in force, and to define by agreement the distance from either end where captures might not be made by a belligerent in time of war, and thus to keep alive Article II. of the Clayton-Bulwer treaty. With regard to Lord Granville's suggestion that the United States should take the initiative in an invitation to other powers to participate in an agreement of neutralization based on the Clayton-Bulwer treaty, Mr. Frelinghuysen said that the President was constrained to say that the United States could not take part in extending such an invitation. In this relation, Mr. Frelinghuysen maintained that a canal, under the protectorate of the United States and the republic whose territory it might cross, could be freely used by all nations, while the United States would thus in some degree retain the benefit of that conformation of the earth which constituted an element of security and defence; that for thirty years the Panama railroad had been maintained without other protection than that of the United States and the local sovereign; that during the same time the peaceful commerce of the world had moved through the Suez Canal quietly and safely under no international protectorate; that an international guarantee of the neutrality of the transit of the American Isthmus would give the navies of the earth a pretext for assembling in waters contiguous to the American shores, and would besides be in conflict with the Monroe doctrine, a doctrine which it was not anticipated that Great Britain would controvert, since she "suggested" it to the United States, and, when the United States adopted, highly approved it.

Mr. Frelinghuysen also reviewed the discussions in relation to the Clayton-Bulwer treaty between 1850 and 1860, laying special stress on the question of Belize and the conversion of that "settlement" into a British "possession." On this subject, Mr. Frelinghuysen expressed the following conclusion: "Under the treaty of 1850, while it is binding, the United States have not the right to exercise dominion over or to colonize one foot of territory in Central America. Great Britain is under the same rigid restriction. And if Great Britain has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, May 8, 1882, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885) 159; For. Rel. 1882, 271.

Lord Granville replied to Mr. Frelinghuysen in an instruction addressed to Mr. West, British minister at Washington, December 30, 1882. With regard to the position that the treaty, by reason of the existence of the colony of British Honduras, was voidable, Lord Granville said that it would seem to be "opposed to all sound principle that the United States should now claim to abrogate the treaty of 1850, by reason of the existence of a state of things which has prevailed, to their knowledge, before as well as since its ratification, to which the treaty was never intended to apply, and notwithstanding the known existence of which they have more than once recognized the treaty as subsisting." (Corre-

spondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 353, 357; For. Rel. 1883, 484.)

For a further discussion of the subject, see Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, May 5, 1883; Lord Granville to Mr. West, Aug. 17, 1883; Mr. Frelinghuysen to Mr. Lowell, Nov. 22, 1883; Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 359, 363, 365; For. Rel. 1883, 418, 529, 477.

"The treaty was voidable at the option of the United States. This, I think, has been demonstrated fully on two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast." (Mr. Frelinghuysen, Sec. of State, to Mr. Hall, min. to Cent. Am., July 19, 1884, MS. Inst. Cent. Am. XVIII. 443).

#### 9. FRELINGHUYSEN-ZAVALA CONVENTION.

##### § 361.

December 1, 1884, Mr. Frelinghuysen, then Secretary of State, and Gen. Joaquin Zavala, ex-President of Nicaragua, signed at Washington a convention by which the United States engaged to build a canal at its own cost, and with that view entered into a "perpetual alliance" with Nicaragua and agreed "to protect the integrity of the territory of the latter." While the convention provided for "equal" tolls for the vessels of "all nations" (except vessels of the contracting parties engaged in the coasting trade), and contained no stipulation for the fortification of the canal, yet it did not provide for its neutralization. It was submitted to the Senate December 10, 1884. It had not been approved by that body when, in the following March, President Cleveland withdrew it for reexamination.

Message of President Arthur to the Senate, Dec. 10, 1884, Conf. Exec. F. 48 Cong. 2 sess., submitting the treaty of December 1, 1884, to the Senate for its advice and consent. The injunction of secrecy was removed from the message and treaty January 6, 1891.

As to the special mission of Captain S. L. Phelps to Nicaragua to conduct certain negotiations with reference to a canal, see Mr. John Davis, Act. Sec. of State, to Mr. Hall, min. to Central America, conf., Sept. 23, 1882, MS. Inst. Central America. XVIII. 339; Mr. Frelinghuysen, Sec. of State, to Capt. Phelps, April 28, 1884, MS. Inst. Peru, XVII. 132.

As to preliminary negotiations with Nicaragua, see, further, Mr. Frelinghuysen, Sec. of State, to Mr. Hall, min. to Central America, Feb. 24, 1883, Feb. 12, March 5, March 8, and April 3, 1884, MS. Inst. Central America, XVIII. 340, 454, 483, 457, 458.

For a review of the preliminary negotiations, see Mr. Frelinghuysen, Sec. of State, to Mr. Hall, min. to Central America, July 19, 1884, MS. Inst. Central America, XVIII. 443.

"Canal treaty published in New York *Tribune* to-day obtained from some source of which we are entirely ignorant, and published without authority." (Mr. Frelinghuysen, Sec. of State, to Mr. Hall, min. to Central America, tel., Dec. 18, 1884, MS. Inst. Central America, XVIII. 488.)

For correspondence as to the exceptions taken and the reservations made by Costa Rica to the Frelinghuysen-Zavala convention, see Mr. Peralta, Costa Rican minister, to Mr. Frelinghuysen, Sec. of State, Feb. 28, 1885; Mr. Frelinghuysen to Mr. Peralta, March 3, 1885: S. Ex. Doc. 50, 49 Cong. 2 sess. 18, 21.

See, also, Mr. Bayard, Sec. of State, to Mr. Viquez, Costa Rican chargé, Nov. 28, 1885, S. Ex. Doc. 50, 49 Cong. 2 sess. 46; Report of Mr. Bayard, Sec. of State, to the President, Jan. 25, 1887, together with other correspondence in relation to the position of Costa Rica, id. 1. Mr. Bayard's report was transmitted by President Cleveland to the Senate on the day on which it was made, in answer to a resolution of that body of Dec. 21, 1886, calling for certain correspondence.

Notice was given, in case the treaty should be ratified, of a possible claim of Mr. F. A. Pellas, against the Government of the United States, based on a concession from Nicaragua of the exclusive navigation for eighteen years of the river San Juan del Norte and the Lake of Granada, for the purpose of transporting the productions of the country and goods intended for its interior trade. (Mr. Bayard, Sec. of State, to Mr. Goodman, May 18, 1885, 155 MS. Dom. Let. 410.)

#### 10. PRESIDENT CLEVELAND'S MESSAGE, 1885.

#### § 362.

"The interest of the United States in a practicable transit for ships across the strip of land separating the Atlantic from the Pacific has been repeatedly manifested during the last half century.

"My immediate predecessor caused to be negotiated with Nicaragua a treaty for the construction, by and at the sole cost of the United States, of a canal through Nicaraguan territory, and laid it before the Senate. Pending the action of that body thereon, I withdrew the treaty for re-examination. Attentive consideration of its provisions leads me to withhold it from resubmission to the Senate.

"Maintaining, as I do, the tenets of a line of precedents from Washington's day, which proscribe entangling alliances with foreign states, I do not favor a policy of acquisition of new and distant territory or the incorporation of remote interests with our own.

"The laws of progress are vital and organic, and we must be conscious of that irresistible tide of commercial expansion which, as the concomitant of our active civilization, day by day, is being urged onward by those increasing facilities of production, transportation, and communication to which steam and electricity have given birth; but our duty in the present instructs us to address ourselves mainly to the development of the vast resources of the great area committed to our charge, and to the cultivation of the arts of peace within our own borders, though jealously alert in preventing the American hemisphere from being involved in the political problems and complications of distant governments. Therefore, I am unable to recommend propositions involving paramount privileges of ownership or right outside of our own territory, when coupled with absolute and

unlimited engagements to defend the territorial integrity of the state where such interests lie. While the general project of connecting the two oceans by means of a canal is to be encouraged, I am of opinion that any scheme to that end to be considered with favor should be free from the features alluded to.

“The Tehuantepec route is declared, by engineers of the highest repute and by competent scientists, to afford an entirely practicable transit for vessels and cargoes, by means of a ship-railway, from the Atlantic to the Pacific. The obvious advantages of such a route, if feasible, over others more remote from the axial lines of traffic between Europe and the Pacific, and, particularly, between the valley of the Mississippi and the western coast of North and South America, are deserving of consideration.

“Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities or a prize for warlike ambition. An engagement combining the construction, ownership, and operation of such a work by this Government, with an offensive and defensive alliance for its protection, with the foreign state whose responsibilities and rights we would share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means.

“The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American Isthmus and consecrated it in advance to the common use of mankind by their positive declarations and through the formal obligation of treaties. Toward such realization the efforts of my administration will be applied, ever bearing in mind the principles on which it must rest, and which were declared in no uncertain tones by Mr. Cass, who, while Secretary of State, in 1858, announced that ‘What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it.’

“The construction of three transcontinental lines of railway all in successful operation, wholly within our territory and uniting the Atlantic and the Pacific Oceans, has been accompanied by results of a most interesting and impressive nature, and has created new conditions, not in the routes of commerce only, but in political geography, which powerfully affect our relations toward, and necessarily increase our interests in, any trans-isthmian route which may be opened and employed for the ends of peace and traffic, or, in other contingencies, for uses inimical to both.

"Transportation is a factor in the cost of commodities scarcely second to that of their production, and weighs as heavily upon the consumer.

"Our experience already has proven the great importance of having the competition between land carriage and water carriage fully developed, each acting as a protection to the public against the tendencies to monopoly which are inherent in the consolidation of wealth and power in the hands of vast corporations.

"These suggestions may serve to emphasize what I have already said on the score of the necessity of a neutralization of any interoceanic transit; and this can only be accomplished by making the uses of the route open to all nations and subject to the ambitions and warlike necessities of none."

President Cleveland, annual message, Dec. 8, 1885. (For. Rel. 1885, p. v.)

"The opening of an interoceanic canal by way of Lake Nicaragua has received the most careful consideration of the present Executive, and his interest in the construction of such an enterprise, under the control and guidance of American ownership and capital, was presented impressively in his first annual message to Congress in December 1885 . . . I am warranted in saying that he has undergone no change in the views nor abatement in the interest as set forth in that paper." (Mr. Bayard, Sec. of State, to Messrs. Billings & Daly, Jan. 7, 1887, 162 MS. Dom. Let. 510.)

With respect to a statement that an application was to be made to the Governments of Colombia and Costa Rica for a new concession for a railway across the Isthmus of Chiriqui, with grants of land and harbor rights upon Chiriqui Lagoon and Golfo Dulce, but that, before the application was presented, the "favor and counsel" of the United States, of which the proposed applicants were citizens, were desired, the Department of State replied that any tangible and operative scheme of interoceanic communication, carried out by American capital, would have the friendly support of the Government, within the lines laid down in the President's annual message of 1885, but added: "It is not proper, however, for the Department to express any opinion as to the scheme you propose nor to give any advice to you or others, meditating business enterprises in a foreign land, as to the inducements or obstacles which may be in their way. If such advice were given, it would be called upon afterwards to sustain it, which would be outside its constitutional orbit. Nor can this Department present you to any foreign Government as in any way entitled to speak for the United States. Such function can be entrusted only to the diplomatic representatives of the Government." (Mr. Bayard, Sec. of State, to Messrs. Dillon et al., February 16, 1887, 163 MS. Dom. Let. 161.)

"The canal company has, unfortunately, become financially seriously embarrassed, but a generous treatment has been extended to it by the Government of Nicaragua. The United States are especially interested in the successful achievement of the vast undertaking this company has in charge. That it should be accomplished under distinctively American auspices, and its enjoyment assured not only to the vessels of this country as a channel of communication between our Atlantic and Pacific seaboard, but to the ships of the world in the interests of civ-

ilization, is a proposition which, in my judgment, does not admit of question." (President Cleveland, ann. message, Dec. 4, 1893, For. Rel. 1893, p. viii.)

"The great interest expressed in the proposed construction of the interoceanic canal by citizens of the United States, under charter granted according to the laws of the United States, and the concern naturally felt for the security of the vast capital necessary for the accomplishment of such a work under effective guaranties of stability and order, should serve to advise the statesmen of Guatemala of the new and important enterprises thus inaugurated, and lead them to realize the magnitude of the concern which would necessarily be felt should any ill-counseled plans of domination or control cast a doubt upon the capacity of the independent Central American States to maintain orderly and local self-government, and observe relations of good-will toward each other."

Mr. Bayard, Sec. of State, to Mr. Hall, min. to Cent. Am., Feb. 27, 1888, For. Rel. 1888, I. 131, referring to the disquietude felt in Nicaragua because of rumors that the plan of forcible consolidation of the Central American Republics, which had failed when undertaken by President Barrios, of Guatemala, was to be revived by his successor, General Barillas.

See, also, Mr. Bayard, Sec. of State, to Sec. of Navy, Sept. 12, 1888, suggesting that an investigation be made of an alleged design or attempt on the part of the Colombian Government to seize and occupy Corn Island, on the Nicaraguan coast, near the Atlantic approach to the projected Nicaraguan ship-canal. (169 MS. Dom. Let. 648.)

# 11. EXECUTIVE UTTERANCES, 1889-1894.

## § 363.

"The annual report of the Maritime Canal Company of Nicaragua shows that much costly and necessary preparatory work has been done during the year in the construction of shops, railroad tracks, and harbor piers and breakwaters, and that the work of canal construction has made some progress.

"I deem it to be a matter of the highest concern to the United States that this canal, connecting the waters of the Atlantic and Pacific oceans and giving to us a short water communication between our ports upon those two great seas, should be speedily constructed and at the smallest practicable limit of cost. The gain in freights to the people and the direct saving to the Government of the United States in the use of its naval vessels would pay the entire cost of this work within a short series of years. The report of the Secretary of the Navy shows the saving in our naval expenditures which would result.

"The Senator from Alabama (Mr. Morgan), in his argument upon this subject before the Senate at the last session, did not overestimate the importance of this work when he said that 'the canal is the most



important subject now connected with the commercial growth and progress of the United States.'

"If this work is to be promoted by the usual financial methods and without the aid of this Government, the expenditures, in its interest-bearing securities and stocks, will probably be twice the actual cost. This will necessitate higher tolls and constitute a heavy and altogether needless burden upon our commerce and that of the world. Every dollar of the bonds and stock of the company should represent a dollar expended in the legitimate and economical prosecution of the work. This is only possible by giving to the bonds the guaranty of the United States Government. Such a guaranty would secure the ready sale at par of a 3 per cent bond, from time to time, as the money was needed. I do not doubt that, built upon these business methods, the canal would, when fully inaugurated, earn its fixed charges and operating expenses. But if its bonds are to be marketed at heavy discounts and every bond sold is to be accompanied by a gift of stock, as has come to be expected by investors in such enterprises, the traffic will be seriously burdened to pay interest and dividends. I am quite willing to recommend Government promotion in the prosecution of a work which, if no other means offered for securing its completion, is of such transcendent interest that the Government should, in my opinion, secure it by direct appropriations from its Treasury.

"A guaranty of the bonds of the Canal Company to an amount necessary to the completion of the canal could, I think, be so given as not to involve any serious risk of ultimate loss. The things to be carefully guarded are the completion of the work within the limits of the guaranty, the subrogation of the United States to the rights of the first-mortgage bondholders for any amounts it may have to pay, and in the meantime a control of the stock of the company as a security against mismanagement and loss. I most sincerely hope that neither party nor sectional lines will be drawn upon this great American project, so full of interest to the people of all our States and so influential in its effects upon the prestige and prosperity of our common country."

President Harrison, annual message, Dec. 9, 1891. (For. Rel. 1891, p. xiii.)

"I repeat with great earnestness the recommendation which I have made in several previous messages that prompt and adequate support be given to the American company engaged in the construction of the Nicaragua Ship Canal. It is impossible to overstate the value from every standpoint of this great enterprise, and I hope that there may be time, even in this Congress, to give to it an impetus that will insure the early completion of the canal and secure to the United States its proper relation to it when completed." (President Harrison, annual message, Dec. 6, 1892, For. Rel. 1892, p. xvi.)

"In pursuance of the charter granted by Congress, and under the terms of its contract with the Government of Nicaragua, the Interoceanic Canal Company has begun the construction of the important water-way between the two oceans which its organization contemplates. Grave

complications for a time seemed imminent, in view of a supposed conflict of jurisdiction between Nicaragua and Costa Rica in regard to the accessory privileges to be conceded by the latter Republic toward the construction of works on the San Juan River, of which the right bank is Costa Rican territory. I am happy to learn that a friendly arrangement has been effected between the two nations. This Government has held itself ready to promote in every proper way the adjustment of all questions that might present obstacles to the completion of a work of such transcendent importance to the commerce of this country, and indeed to the commercial interests of the world." (President Harrison, annual message, Dec. 3, 1889, For. Rel. 1889, p. vii.)

See report of Mr. Sherman, Committee on For. Rel., Jan. 10, 1891, in which the ground is taken that the Clayton-Bulwer treaty is obsolete, S. Rep. 1944, 51 Cong. 2 sess.

See, also, S. Rep. 1142, 52 Cong. 2 sess.

See report of Mr. Morgan, Com. on Interoceanic Canals, June 4, 1900, on the Clayton-Bulwer treaty, S. Rep. 1649, 56 Cong. 1 sess.

"I can add little to what has been so ably and earnestly said on many occasions heretofore touching the deep conviction felt by this Government that the completion of the interoceanic canal under distinctively American auspices and in the interest of the independent states of this hemisphere and of the world's commerce is a necessity, the importance of which is shown to grow more vital with each passing year. In the President's judgment, the speedy realization of the work is one of the highest aims toward which the two Governments can move in friendly accord, and no effort will be wanting on our part to bring about so desirable a result, with due regard to all the vast interests involved therein."

Mr. Gresham, Sec. of State, to Mr. Guzman, Nicaraguan min., May 1, 1894, For. Rel. 1894, 461.

See, as to representations to the Nicaraguan Government concerning the notice of forfeiture of the concession of the Maritime Canal Company of Nicaragua, For. Rel. 1894, 461-465.

## 12. MR. OLNEY'S MEMORANDUM, 1896.

### § 364.

"The Clayton-Bulwer Treaty had its origin in an earnest desire on the part of the Government and people of this country to shorten the transit and to facilitate the communications between our then newly acquired possessions on the Pacific coast and the rest of the United States. California was acquired in 1848, and the opening of its gold fields and the rush of population thither followed almost immediately. In 1849, the United States, by treaty with Nicaragua, secured concessions in favor of an American company organized for the construction of a canal between the two oceans via the lakes of Nicaragua and the River San Juan. Two obstacles, however, stood in the way of this company's successful prosecution of the work. One was the

rights asserted by Great Britain over the Mosquito Coast. The other was the inability to procure the necessary capital in this country, or to procure it in England or elsewhere abroad, so long as the enterprise was conducted under purely American auspices. To remove the first of these difficulties, in 1849, Mr. Clayton, the then Secretary of State, applied to the British Government, through its minister at Washington, for the withdrawal of the British pretensions to dominion over the Mosquito Coast. The answer was a refusal coupled with an intimation that Great Britain was willing to enter into a treaty for a joint protectorate over the proposed canal. It being supposed, undoubtedly, that if the canal were built under British protection the only remaining obstacle to its construction, namely, want of sufficient capital, would also disappear, negotiations were set on foot between the two Governments on the basis of the British proposal. They progressed with great rapidity and with the result that in June, 1850, the Clayton-Bulwer Treaty was signed.

- "The treaty is characterized by certain remarkable features. It contains numerous and apt provisions for the protection, safety, and neutralization of the proposed ship canal; but it deals not merely with the particular subject-matter which, in the view of the United States, led to its negotiation. It also deals with others of larger magnitude, contemplates alliances with other powers, and lays down general principles for the future guidance of the parties. The United States, in entering upon the negotiation, aimed to accomplish two specific things—the renunciation by Great Britain of its claim to the Mosquito Coast and such a protectorate over the canal by Great Britain jointly with the United States as might be expected to attract to the canal British capital. As the result of the negotiations, it secured not only the two things specified, but also a third, viz, Great Britain's express agreement, so far as Central America was concerned, to give effect to the so-called Monroe doctrine. For these advantages it rendered, of course, a consideration. It waived the Monroe doctrine to the extent of the joint protectorate of the then proposed canal and by Article VIII. agreed to waive it as respects all other practicable communications across the Isthmus connecting North and South America, whether by canal or railway. In short, the true operation and effect of the Clayton-Bulwer Treaty is that, as respects Central America generally, Great Britain has expressly bound herself to the Monroe doctrine, while, as respects all water and land interoceanic communications across the Isthmus, the United States has expressly bound itself to so far waive the Monroe doctrine as to admit Great Britain to a joint protectorate.

"Assuming the effect of the Clayton-Bulwer Treaty to be as above stated, the further inquiry is whether the Clayton-Bulwer Treaty is to be regarded as now in force, in whole or in part. This resolves itself into the question, whether the United States is now at liberty to

regard the treaty as a nullity. Great Britain's position in the matter has never been doubtful, and has always been the same. She has always insisted, and still insists, upon the treaty being in full life and force. There was a period of ten years, indeed, from 1850 to 1860, when she undoubtedly did not fully comply with the provisions of the treaty. The complaints of this country were as loud as they were just, and might well have been made the ground for an annulment of the treaty altogether. Great Britain undertook to meet the complaints by suggesting modifications of the treaty or an arbitration as to the meaning of its terms, and, these expedients failing, even intimated a readiness to entertain a proposal for its complete abrogation. The proposal was declined by General Cass because, as Mr. Blaine conjectures, he was unwilling to give the implied consent of this country that Great Britain should be at liberty to negotiate treaties with the Central American states unhampered by the provisions of the Clayton-Bulwer Treaty. 'Modification, arbitration, and abrogation \* \* \* having been flatly rejected'—such was the language of Lord Malmesbury—Great Britain next undertook to put herself in a position in which she could no longer be charged with violating the treaty, by making separate treaties with the Central American states. Accordingly, in 1859 and 1860, she concluded treaties with Nicaragua and Honduras, substantially according with the general tenor of the American interpretation of the treaty. The result was hailed with great satisfaction in this country. The language of President Buchanan, in his annual message, December, 1860, is as follows: [Here follows the passage from President Buchanan's Fourth Annual Message, given *supra*, p 182.]

"This announcement of President Buchanan was received by Congress without a symptom of dissent, and since that time every Administration, and, with a single exception, every Secretary of State, has dealt with the Clayton-Bulwer Treaty as a subsisting and binding instrument. In 1866, Mr. Seward, writing to our Minister at St. James, queries whether, as the renunciatory clauses of the treaty relate to a proposed canal, they will operate forever if no canal should ever be begun. While thinking they would not, still, the question being an open one, he declared that neither party could fairly do anything contrary to the spirit of the treaty, and he therefore instructed the American minister to quietly ascertain the disposition of the British Government to favor our acquiring coaling stations in Central America, notwithstanding the treaty. In 1872, Mr. Fish instructed our minister to England, if certain statements should prove to be correct, to formally remonstrate against certain trespasses upon the territory of Guatemala as being an infringement of the Clayton-Bulwer Treaty. In 1880, the then Secretary of State, Mr. Evarts, took the same ground, in view of a rumored alienation of the Bay Islands to Great Britain. His successor, Mr. Blaine, declared

that the treaty had been 'misunderstandingly entered into, imperfectly comprehended, contradictorily interpreted, and mutually vexatious.' But, while earnestly calling for its revision on the ground of radically changed conditions, he made no claim that the treaty was not in being and, indeed, by the very call for revision, conclusively admitted its existence. Mr. Bayard, in 1888, while declining to comment upon any opinions of his predecessors respecting the temporary or perpetual existence of any of the provisions of the treaty, insisted upon them as binding upon Great Britain by her own admissions. From these utterances from the heads of the Department of State, there is but one dissent. Mr. Frelinghuysen, in 1882-83, took the distinct ground that the treaty was, as he expressed it, 'voidable,' though, if his argument be admitted to be sound, it is difficult to see why he should not have used the term 'void,' instead of 'voidable.' It remains to examine the grounds of Mr. Frelinghuysen's conclusions, which rest upon two contentions.

"One is that the first seven articles of the treaty relate to a particular ship canal, to be constructed by a particular company, under a particular treaty concession made in 1849; that the treaty and the concession and the company have all passed away without the building of any canal; and that, consequently, these seven articles are obsolete and without any subject-matter upon which to operate. One obvious answer is that this point of Mr. Frelinghuysen, however ingenious, is taken too late; that for thirty years the uniform construction of both Great Britain and the United States, and of the statesmen of each country, has been the other way; that this uniform construction, which each party has so long continuously enforced upon the other as the true construction, now estops each of them from drawing it in question. If it were true that the parties to the treaty, by these first seven articles, were referring only to the particular canal of the then existing company, would the fact not have been known and proclaimed when the treaty was new, and by the very men who made it, and would it have been left to Mr. Frelinghuysen to discover, after the lapse of more than a quarter of a century? But the true answer is to be found within the four corners of the treaty itself, in its general scope and tenor, as well as its particular language. If the first seven articles were meant to apply to the canal of a particular existing company, there is no conceivable reason why that company and its canal should not have been precisely identified by name or in some other unmistakable manner. But the treaty is carefully drawn to exclude any limitations of that sort. The preamble recites that the parties desired to fix 'in a convention their views and intentions with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific oceans.' The general description of the route—'by way of the River San Juan de Nicaragua and either or both of the lakes

of Nicaragua or Managua to any port or place on the Pacific Ocean'—is equally general and equally comprehensive—the termini on the Atlantic and Pacific being wholly undefined, while the character of the intervening country makes the river and the lakes mentioned necessary features to a greater or less extent of every canal projected in that region. Article VII. is equally inconsistent with the idea that any special canal or special canal company is the subject of it and the preceding articles. The contracting parties thereby agree to give their support and encouragement to the first person or company offering to build the canal—with a preference to any person or company having already got contracts or expended time, money, and trouble on the enterprise—and if the person or company so preferred do not, within a year, furnish evidence of having procured sufficient capital, the contracting parties may then give their aid and encouragement to any other person or company. Finally, to limit the operation of the first seven articles to a particular proposed ship canal of a then existing company is contrary to the general scope and spirit of the whole treaty. As Article VIII. expressly declares, the contracting parties by the convention desired, not only 'to accomplish a particular object, but to establish a general principle.' This general principle is manifested by the provisions of the first seven articles and is that the interoceanic routes there specified should, under the sovereignty of the states traversed by them, be neutral and free to all nations alike. The principle was to be extended to all other practicable communications across the Isthmus by canal or railway, and it is impossible to contend with any show of reason that if the ship canal proposed by a company existing at the time of the treaty failed to be built, any other like canal subsequently projected by any other company over the like route is not also within the application of the principle. To hold otherwise, is to hold that the contracting parties, who were settling their relations as to all interoceanic routes across the Isthmus on a permanent basis, failed to anticipate and provide for the most obvious and probable of all contingencies.

"Mr. Frelinghuysen's second proposition is that the treaty is 'voidable' because the Belize district (so called) has been transformed by Great Britain into an organized colony. But, in the first place, the transformation has taken place pursuant to the treaty with Honduras, which was accepted by the United States in 1860 as a satisfactory compliance with the provisions of the Clayton-Bulwer Treaty. In the next place, the Belize colony was organized in 1862 and, until the time of Mr. Frelinghuysen, its organization was never made a cause of complaint by the United States. In the third place, if the organization of the Belize colony is to be deemed an infraction of the Clayton-Bulwer Treaty, the United States has acquiesced therein too long to claim that the treaty has thereby become null and void. If not

altogether estopped to treat the colony as a grievance, its only remedy is to give notice that it will regard the future maintenance of the colony as a violation of the treaty and, if its remonstrance is not heeded, to then take such further steps in the matter for the abrogation of the treaty, or otherwise, as it may deem expedient. But, that the existence of the Belize colony gives any present right to deal with the treaty as a nullity can not be maintained for a moment.

“Besides the objections to the operation of the treaty just considered, and which are especially applicable to the first seven articles, Mr. Frelinghuysen regards the eighth article as of no vital force, for two reasons. One is that the treaty must stand or fall as a whole, and that, the first seven articles being assumed to be without effect for want of a subject-matter, the eighth is not effective also. The answer to this suggestion has already been given. The second reason given is that by the terms of the eighth article itself, its provisions are to be executed through treaty stipulations—none of which have been made. But the absence of any such treaty stipulations is to be accounted for by the fact that no occasion for making them has arisen, while it is not perceived how the circumstance that the eighth article is not self-executing impairs the obligation to enter into such conventions, at the proper time or times, as will execute them. The contracting parties having settled a principle, applied it by appropriate provisions to the case immediately in hand. They then not merely expressed their intent to apply it to other like cases arising in the future, but bound themselves to do so. The obligation is imperative, and neither party can discharge itself therefrom except either by making the required treaty stipulations as circumstances call for them or by such honest effort to make them that the failure to succeed can be justly attributed only to the unreasonable demands of the other party.

“On these grounds, but one answer can fairly be made to the question whether the United States is now at liberty to declare the Clayton-Bulwer Treaty as without binding force. The suggestion for the first time urged by Mr. Frelinghuysen—that the treaty referred to a particular canal, to be constructed by a particular company, under a particular concession, and became a nullity when that company ceased to exist without building the canal—is ingenious rather than sound, antagonizes the language of the treaty itself, and is not supported by any contemporary conduct or construction. Against the suggestion are to be put the utterances of all other Secretaries of State since the treaty was made and the uniform course of the Government for upwards of thirty years. In no instance have the former failed to deal with the treaty as a binding obligation—in no instance, when occasion justified it, has this Government failed to call upon Great Britain to comply with its provisions—while, during the first ten years of the life of the treaty, when it might have been abrogated, either for violations by Great Britain or with the latter's consent, the United States steadily insisted upon holding Great Britain to its obligations.

Under these circumstances, upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor.

"If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter."

Memorandum of Mr. Olney, Sec. of State, 1896, on the Clayton-Bulwer treaty.

As to bills pending in Congress for the construction of an interoceanic canal, see Mr. Rodriguez, minister of the Greater Republic of Central America, to Mr. Olney, Sec. of State, Jan. 15, 1897, For. Rel. 1896, 374-376.

"We are also indebted to it [the Monroe Doctrine] for the provisions of the Clayton-Bulwer treaty, which both neutralized any interoceanic canal across Central America and expressly excluded Great Britain from occupying or exercising any dominion over any part of Central America." (Mr. Olney, Sec. of State, to Mr. Bayard, amb. to Great Britain, July 20, 1895, For. Rel. 1895, I. 545, 555, in relation to the Venezuelan boundary.)

"It [the Monroe Doctrine] was at once invoked in consequence of the supposed peril of Cuba on the side of Europe; it was applied to a similar danger threatening Yucatan; it was embodied in the treaty of the United States and Great Britain as to Central America; it produced the successful opposition of the United States to the attempt of Great Britain to exercise dominion in Nicaragua under the cover of the Mosquito Indians; . . ." (Report of Mr. Fish, Sec. of State, July 14, 1870, accompanying President Grant's message to the Senate of the same date, S. Ex. Doc. 112, 41 Cong. 2 sess. 7.)

### 13. RECOMMENDATIONS BY PRESIDENT MCKINLEY.

#### § 365.

"A subject of large importance to our country and increasing appreciation on the part of the people, is the completion of the great highway of trade between the Atlantic and Pacific known as the Nicaragua Canal. Its utility and value to American commerce is universally admitted. The Commission appointed under date of July 24th last 'to continue the surveys and examinations authorized by the act approved March 2, 1895,' in regard to 'the proper route, feasibility and cost of construction of the Nicaragua Canal, with a view of making complete plans for the entire work of construction of such canal,' is now employed in the undertaking. In the future I shall take occasion to transmit to Congress the report of this Commission, making at the same time such further suggestions as may then seem advisable."

President McKinley, annual message, Dec. 6, 1897. (For. Rel. 1897, xxiii.)



"That the construction of such a maritime highway is now more than ever indispensable to that intimate and ready intercommunication between our eastern and western seaboard demanded by the annexation of the Hawaiian Islands and the prospective expansion of our influence and commerce in the Pacific, and that our national policy now more imperatively than ever calls for its control by this Government, are propositions which I doubt not the Congress will duly appreciate and wisely act upon."

President McKinley, annual message, Dec. 5, 1898. (For. Rel. 1898, lxxi.)

"The great importance of this work can not be too often or too strongly pressed upon the attention of the Congress. In my message of a year ago I expressed my views of the necessity of a canal which would link the two great oceans, to which I again invite your consideration. The reasons then presented for early action are even stronger now." (President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xvii.)

#### 14. HAY-PAUNCEFOTE TREATY, 1901.

#### § 366.

Feb. 5, 1900, Mr. Hay, Secretary of State, and Lord Pauncefote, British ambassador, signed at Washington a convention, the object of which was declared to be "to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, and to that end to remove any objection which may arise out of the convention of April 19, 1850, commonly called the Clayton-Bulwer treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the 'general principle' of neutralization established in Art. VIII. of that Convention."<sup>a</sup>

The convention of Feb. 5, 1900, was communicated to the Senate, with a message of the President bearing date as of the same day.<sup>b</sup>

The Senate gave its advice and consent to the exchange of ratifications, with certain amendments,<sup>c</sup> which are denoted below in italics, except in the case of Art. III., which, as is indicated by brackets, was stricken out, Art. IV. being made Art. III.:

ARTICLE I. It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Convention, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

<sup>a</sup>See Mr. Hay, Sec. of State, to Mr. White, chargé at London, No. 976, Dec. 7, 1898, MS. Inst. Gr. Br. XXXIII. 40; and Mr. White's No. 613, of Dec. 22, 1899.

<sup>b</sup>S. Doc. 160, 56 Cong. 1 sess.

<sup>c</sup>See, as to the amendments, report of Mr. Davis, Com. on For. Rel., March 9, 1900, and statement of Mr. Morgan, for the minority, S. Ex. Report, No. 1, 56 Cong. 1 sess., printed as S. Doc. 268, 56 Cong. 1 sess.

ARTICLE II. The High Contracting Parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII. of the Clayton-Bulwer Convention, *which convention is hereby superseded*, adopt, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other Powers, signed at Constantinople October 29, 1888, for the Free Navigation of the Suez Maritime Canal, that is to say:

1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

*It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four, and five of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order.*

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purposes of this convention, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

[ARTICLE III. The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it.]

ARTICLE IV. The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged at Washington or at London within six months from the date hereof, or earlier if possible. (Sen. Doc. 85, 57 Cong. 1 sess. 7.)

“In the despatch which I addressed to Lord Pauncefote on the 22nd February last, and which was communicated to Mr. Hay on the 11th March, I explained the reasons for which His Majesty’s Government were unable to accept the amendments introduced by the Senate of the United States into the convention, signed at Washington in February 1900, relative to the construction of an interoceanic canal.

“The amendments were three in number, namely: . . .

“2. The objections entertained by His Majesty’s Government may be briefly stated as follows:

“(1.) The Clayton-Bulwer convention being an international compact of unquestionable validity could not be abrogated or modified save with the consent of both parties to the contract. No attempt had, however, been made to ascertain the views of Her late Majesty’s Government. The convention dealt with several matters for which no provision had been made in the convention of February, 1900, and if the former were wholly abrogated both powers would, except in the vicinity of the canal, recover entire freedom of action in Central America, a change which might be of substantial importance.

“(2.) The reservation to the United States of the right to take any measures which it might find necessary to secure by its own forces the defence of the United States appeared to His Majesty’s Government to involve a distinct departure from the principle of neutralization which until then had found acceptance with both Governments, and which both were, under the convention of 1900, bound to uphold. Moreover, if the amendment were added, the obligations to respect the neutrality of the canal in all circumstances would, so far as Great Britain was concerned, remain in force; the obligation of the United States, on the other hand, would be essentially modified. The result would be a one-sided arrangement, under which Great Britain would be debarred from any warlike action in or around the canal, while the United States would be able to resort to such action even in time of peace to whatever extent they might deem necessary to secure their own safety.

“(3.) The omission of the Article inviting the adherence of other powers placed this country in a position of marked disadvantage compared with other powers; while the United States would have a treaty right to interfere with the canal in time of war, or apprehended war, and while other powers could with a clear conscience disregard any of the restrictions imposed by the convention of 1900, Great Britain alone would be absolutely precluded from resorting to any such action or from taking measures to secure her interests in and near the canal.

“For these reasons His Majesty’s Government preferred, as matters stood, to retain unmodified the provisions of the Clayton-Bulwer con-

vention. They had, however, throughout the negotiations given evidence of their earnest desire to meet the views of the United States, and would sincerely regret a failure to come to an amicable understanding in regard to this important subject.

"3. Mr. Hay, rightly apprehending that His Majesty's Government did not intend to preclude all further attempt at negotiation, has endeavoured to find means by which to reconcile such divergencies of view as exist between the two Governments, and has communicated a further draft of a treaty for the consideration of His Majesty's Government.

"Following the order of the Senate amendments, the convention now proposed—

"(1.) Provides by a separate Article that the Clayton-Bulwer convention shall be superseded.

"(2.) The paragraph inserted by the Senate after section 5 of Article II. is omitted.

"(3.) The Article inviting other powers to adhere is omitted.

"There are three other points to which attention must be directed:—

"(a.) The words 'in time of war as in time of peace' are omitted in Rule 1.

"(b.) The draft contains no stipulation against the acquisition of sovereignty over the isthmus or over the strip of territory through which the canal is intended to pass. There was no stipulation of this kind in the Hay-Pauncefote convention; but, by the surviving portion of Article I. of the Clayton-Bulwer convention, the two Governments agreed that neither would ever 'occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America,' nor attain any of the foregoing objects by protection offered to, or alliance with, any State or people of Central America.

"(c.) While the amendment reserving to the United States the right of providing for the defence of the canal is no longer pressed for, the first portion of Rule 7, providing that 'no fortifications shall be erected commanding the canal or the waters adjacent,' has been omitted. The latter portion of the Rule has been incorporated in Rule 2 of the new draft, and makes provision for military police to protect the canal against lawlessness and disorder.

"4. I fully recognize the friendly spirit which has prompted Mr. Hay in making further proposals for the settlement of the question, and while in no way abandoning the position which His Majesty's Government assumed in rejecting the Senate amendments, or admitting that the despatch of the 22nd of February was other than a well-founded, moderate, and reasonable statement of the British case, I have examined the draft treaty with every wish to arrive at a conclusion which shall facilitate the construction of an interoceanic canal by the United States, without involving on the part of His Majesty's Government

any departure from the principles for which they have throughout contended.

“5. In form the new draft differs from the convention of 1900, under which the High Contracting Parties, after agreeing that the canal might be constructed by the United States, undertook to adopt certain Rules as the basis upon which the canal was to be neutralized. In the new draft the United States intimate *their* readiness ‘to adopt’ somewhat similar Rules as the basis of the neutralization of the canal. It would appear to follow that the whole responsibility for upholding these Rules, and thereby maintaining the neutrality of the canal, would henceforward be assumed by the Government of the United States. The change of form is an important one, but in view of the fact that the whole cost of the construction of the canal is to be borne by that Government, which is also to be charged with such measures as may be necessary to protect it against lawlessness and disorder, His Majesty’s Government are not likely to object to it.

“6. The proposal to abrogate the Clayton-Bulwer convention is not, I think, inadmissible if it can be shown that sufficient provision is made in the new treaty for such portions of the convention as ought, in the interests of this country, to remain in force. This aspect of the case must be considered in connection with the provisions of Article I. of the Clayton-Bulwer convention which have already been quoted, and Article VIII. referred to in the preamble of the new treaty.

“Thus, in view of the permanent character of the treaty to be concluded and of the ‘general principle’ reaffirmed thereby as a perpetual obligation, the High Contracting Parties should agree that no change of sovereignty or other change of circumstances in the territory through which the canal is intended to pass shall affect such ‘general principle’ or release the High Contracting Parties, or either of them, from their obligations under the treaty, and that the Rules adopted as the basis of neutralization shall govern, so far as possible, all interoceanic communications across the isthmus.

“I would therefore propose an additional Article in the following terms, on the acceptance of which His Majesty’s Government would probably be prepared to withdraw their objections to the formal abrogation of the Clayton-Bulwer convention:—

“‘In view of the permanent character of this treaty, whereby the general principle established by Article VIII. of the Clayton-Bulwer convention is reaffirmed, the High Contracting Parties hereby declare and agree that the Rules laid down in the last preceding Article shall, so far as they may be applicable, govern all interoceanic communications across the isthmus which connects North and South America, and that no change of territorial sovereignty, or other change of circumstances, shall affect such general principle or the obligations of

the High Contracting Parties under the present treaty.' [This article is referred to as III. A, in the subsequent discussion.]

"7. The various points connected with the defence of the canal may conveniently be considered together. In the present draft the Senate amendment has been dropped, which left the United States at liberty to apply such measures as might be found 'necessary to take for securing by its own forces the defence of the United States.' On the other hand, the words 'in time of war as in time of peace' are omitted from Rule 1, and there is no stipulation, as originally in Rule 7, prohibiting the erection of fortifications commanding the canal or the waters adjacent.

"I do not fail to observe the important difference between the question as now presented to us and the position which was created by the amendment adopted in the Senate.

"In my despatch I pointed out the dangerous ambiguity of an instrument of which one clause permitted the adoption of defensive measures, while another prohibited the erection of fortifications. It is most important that no doubt should exist as to the intention of the Contracting Parties. As to this, I understand that by the omission of all reference to the matter of defence the United States' Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of an enemy or enemies. On the other hand, I conclude that, with the above exception, there is no intention to derogate from the principles of neutrality laid down by the Rules. As to the first of these propositions, I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defence of the canal at a moment when they were themselves engaged in hostilities.

"It is also to be borne in mind that, owing to the omission of the words under which this country became jointly bound to defend the neutrality of the canal, and the abrogation of the Clayton-Bulwer treaty, the obligations of Great Britain would be materially diminished.

"This is a most important consideration. In my despatch of the 22nd February, I dwelt upon the strong objection entertained by His Majesty's Government to any agreement under which, while the United States would have a treaty right to interfere with the canal in time of war, or apprehended war, Great Britain alone, in spite of her vast possessions on the American continent, and the extent of her interests in the East, would be absolutely precluded from resorting to any such action, or from taking measures to secure her interests in and near the canal. The same exception could not be taken to an arrangement under which, supposing that the United States, as the power owning the canal and responsible for the maintenance of its neutrality,

should find it necessary to interfere temporarily with its free use by the shipping of another power, that power would thereupon at once and *ipso facto* become liberated from the necessity of observing the Rules laid down in the new treaty.

"8. The difficulty raised by the absence of any provision for the adherence of other powers still remains. While indifferent as to the form in which the point is met, I must emphatically renew the objections of His Majesty's Government to being bound by stringent Rules of neutral conduct not equally binding upon other powers. I would therefore suggest the insertion in Rule 1, after 'all nations,' of the words 'which shall agree to observe these Rules.' This addition will impose upon other powers the same self-denying ordinance as Great Britain is desired to accept, and will furnish an additional security for the neutrality of the canal, which it will be the duty of the United States to maintain.

"As matters of minor importance, I suggest the renewal of one of the stipulations of Article VIII. of the Clayton-Bulwer convention by adding to Rule 1 the words 'such conditions and charges shall be just and equitable,' and the adoption of 'treaty' in lieu of 'convention' to designate the international agreement which the High Contracting Parties may conclude.

"Mr. Hay's draft, with the proposed amendments shown in italics, is annexed."

Memorandum, accompanying a dispatch of Lord Lansdowne, Foreign Secretary, to Mr. Lowther, chargé, Aug. 3, 1901, Parl. Pap., United States, No. 1 (1902), 2.

"I have to inform you that I have learned from Lord Pauncefoot that Mr. Hay has laid before the President the memorandum, a copy of which was forwarded to you in my despatch of the 3rd August.

Lord Lansdowne to Mr. Lowther, Sept. 12, 1901.

"Mr. McKinley regarded, as did Mr. Hay, the consideration shown to the last proposals of the United States' Government relative to the Interoceanic Canal Treaty as in the highest degree friendly and reasonable.

"With regard to the changes suggested by His Majesty's Government, Mr. Hay was apprehensive that the first amendment proposed to clause 1 of Article III. would meet with opposition because of the strong objection entertained to inviting other powers to become contract parties to a treaty affecting the canal. If His Majesty's Government found it not convenient to accept the draft as it stood, they might perhaps consider favourably the substitution for the words 'the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these Rules' the words 'the canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules,' and instead of 'any nation so

agreeing' the words 'any such nation.' This, it seemed to Mr. Hay, would accomplish the purpose aimed at by His Majesty's Government.

"The second amendment in the same clause, providing that conditions and charges of traffic shall be just and equitable, was accepted by the President.

"Coming to Article numbered III. A, which might be called Article IV., Mr. Hay pointed out that the preamble of the draft treaty retained the declaration that the general principle of neutralization established in Article VIII. of the Clayton-Bulwer convention was not impaired. To reiterate this in still stronger language in a separate article, and to give to Article VIII. of the Clayton-Bulwer convention what seemed a wider application than it originally had, would, Mr. Hay feared, not meet with acceptance.

"If, however, it seemed indispensable to His Majesty's Government that an article providing for the contingency of a change in sovereignty should be inserted, he thought it might state that:—

"It is agreed that no change of territorial sovereignty or of the international relations of the country traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present treaty.' This would cover the point in a brief and simple way.

"In conclusion, Mr. Hay expressed his appreciation of the friendly and magnanimous spirit shown by His Majesty's Government in the treatment of this matter, and his hope that a solution would be attained which would enable the United States' Government to start at once upon the great enterprise which so vitally concerned the whole world, and especially Great Britain, as the first of commercial nations."

Marquis of Lansdowne to Mr. Lowther, Sept. 12, 1901, Parl. Pap., United States, No. 1 (1902), 7.

"I informed the United States' chargé d'affaires to-day that His Majesty's Government had given their careful attention to the various amendments which had been suggested in the draft Inter-oceanic Canal Treaty, communicated by Mr. Hay to your lordship on the 25th April last, and that I was now in a position to inform him officially of our views.

Lord Lansdowne  
to Lord Pauncefote,  
Oct. 23, 1901.

"Mr. Hay had suggested that in Article III., Rule 1, we should substitute for the words 'the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these Rules,' &c., the words 'the canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules,' and in the same clause, as a consequential amendment, to substitute for the words 'any nation so agreeing' the words 'any such nation.' His Majesty's Government were prepared to accept this amendment, which seemed to us equally efficacious for the purpose which we had in view,



namely, that of insuring that Great Britain should not be placed in a less advantageous position than other powers, while they stopped short of conferring upon other nations a contractual right to the use of the canal.

"We were also prepared to accept, in lieu of Article III. A, the new Article IV. proposed by Mr. Hay, which, with the addition of the words 'or countries' proposed in the course of the discussions here, runs as follows:—

"It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present treaty."

"I admitted that there was some force in the contention of Mr. Hay, which had been strongly supported in conversation with me by Mr. Choate, that Article III. A, as drafted by His Majesty's Government, gave to Article VIII. of the Clayton-Bulwer Treaty a wider application than it originally possessed.

"In addition to these amendments, we proposed to add in the preamble, after the words 'being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans,' the words 'by whatever route may be considered expedient,' and 'such ship canal' for 'said ship canal' in the first paragraph of Article III., words which, in our opinion, seemed to us desirable for the purpose of removing any doubt which might possibly exist as to the application of the treaty to any other interoceanic canals as well as that through Nicaragua.

"I handed to Mr. White a statement, showing the draft as it originally stood and the amendments proposed on each side."

Marquis of Lansdowne to Lord Pouncefote, Oct. 23, 1901, Parl. Pap., United States, No. 1 (1902), 8.

"Upon your return to Washington, I had the honour to receive from you a copy of the instruction addressed to you on the 23rd October last by the Marquess of Lansdowne, accepting and reducing to final shape the various amendments in the draft of an Interoceanic Canal Treaty, as developed in the course of the negotiations lately conducted in London, through Mr. Choate, with yourself and Lord Lansdowne.

"The treaty, being thus brought into a form representing a complete agreement on the part of the negotiators, has been submitted to the President, who approves of the conclusions reached, and directs me to proceed to the formal signature thereof.

"I have, accordingly, the pleasure to send you a clear copy of the text of the treaty, embodying the several modifications agreed upon. Upon being advised by you that this text correctly represents your

Mr. Hay to Lord Pouncefote, Nov. 8, 1901.

understanding of the agreement thus happily brought about, the treaty will be engrossed for signature at such time as may be most convenient to you."

Mr. Hay, Sec. of State, to Lord Pauncefote, Brit. ambassador, Nov. 8, 1901, Parl. Pap., United States. No. 1 (1902), 9.

The treaty was signed Nov. 18, 1901, and submitted to the Senate Dec. 4.

The following record indicates the action of the Senate:

DECEMBER 4, 1901.—Read; treaty read the first time and referred to the Committee on Foreign Relations and, together with the message, ordered to be printed in confidence for the use of the Senate.

DECEMBER 9, 1901.—Reported without amendment.

DECEMBER 10, 1901.—Injunction of secrecy removed.

DECEMBER 16, 1901.—Ratified; injunction of secrecy removed from proposed amendments and votes thereon, and vote of ratification.

For the Hay-Pauncefote treaty of Feb. 5, 1900, with the Senate's amendments; and the treaty of Nov. 18, 1901, with proposed amendments and the votes thereon, see S. Doc. 85, 57 Cong. 1 sess., second corrected print, April 3, 1902.

**Treaty of November 18, 1901.** "The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII. of that Convention, have for that purpose appointed as their Plenipotentiaries:

"The President of the United States, John Hay, Secretary of State of the United States of America;

"And his Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, the Right Honourable Lord Pauncefote, G. C. B., G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

"Who, having communicated to each other their full powers which were found to be in due and proper form, have agreed upon the following Articles:—

"ARTICLE I. The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.

"ARTICLE II. It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations,

or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

“ARTICLE III. The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

“1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

“2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

“3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

“Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

“4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

“5. The provisions of this Article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

“6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal

"ARTICLE IV. It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.

"ARTICLE V. The present Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

"In faith whereof the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

"Done in duplicate at Washington, the 18th day of November, in the year of Our Lord one thousand nine hundred and one.

"JOHN HAY. [SEAL.]

"PAUNCEFOTE. [SEAL.] "

As to negotiations with Colombia, Costa Rica, and Nicaragua, with reference to the construction of the canal by the United States, see H. Doc. 611, 57 Cong. 1 sess.

See, also, "An act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June 28, 1902, 32 Stat., pt. I. 481.

**Message of President Roosevelt.**

"No single great material work which remains to be undertaken on this continent is of such consequence to the American people as the building of a canal across the Isthmus connecting North and South America. Its importance to the Nation is by no means limited merely to its material effects upon our business prosperity; and yet with a view to these effects alone it would be to the last degree important for us immediately to begin it. While its beneficial effects would perhaps be most marked upon the Pacific Coast and the Gulf and South Atlantic States, it would also greatly benefit other sections. It is emphatically a work which it is for the interest of the entire country to begin and complete as soon as possible; it is one of those great works which only a great nation can undertake with prospects of success, and which when done are not only permanent assets in the nation's material interests, but standing monuments to its constructive ability.

"I am glad to be able to announce to you that our negotiations on this subject with Great Britain, conducted on both sides in a spirit of friendliness and mutual good will and respect, have resulted in my being able to lay before the Senate a treaty which if ratified will enable us to begin preparations for an Isthmian canal at any time, and which guarantees to this Nation every right that it has ever asked in connection with the canal. In this treaty, the old Clayton-Bulwer treaty, so long recognized as inadequate to supply the base for the construction and maintenance of a necessarily American ship canal,

is abrogated. It specifically provides that the United States alone shall do the work of building and assume the responsibility of safeguarding the canal and shall regulate its neutral use by all nations on terms of equality without the guaranty or interference of any outside nation from any quarter. The signed treaty will at once be laid before the Senate, and if approved the Congress can then proceed to give effect to the advantages it secures us by providing for the building of the canal."

President Roosevelt, annual message, Dec. 3, 1901. (For. Rel. 1901, p. **xxv**.)

**Resolution of  
Second Interna-  
tional American  
Conference**

The second international conference of American states, held at the city of Mexico in 1901-02, unanimously adopted a resolution applauding the purpose of the United States to construct an interoceanic canal, and declaring that this work not only would be "worthy of the greatness of the American people," but would also be "in the highest sense a work of civilization and to the greatest degree beneficial to the development of commerce between the American states and the other countries of the world."

Second Int. Conf. of Am. States, S. Doc. 330, 57 Cong. 1 sess. 20, 173.

**15. MOSQUITO QUESTION, SINCE 1860.**

**§ 367.**

**Instructions of  
Mr. Fish, 1873.**

"The purposes of that Government were in the main accomplished. On the 28th of January, 1860, a treaty between Great Britain and Nicaragua was signed at Managua. Though this instrument restored to that republic the nominal sovereignty over that part of its territory which had previously been claimed as belonging to the kingdom of the Mosquitos, it assigned boundaries to the Mosquito Reservation probably beyond the limits which any member of that tribe had ever seen, even when in chase of wild animals. Worst of all, however, it confirmed the grants of land previously made in Mosquito territory. The similar stipulation on this subject in the Dallas-Clarendon treaty was perhaps the most objectionable of any, as it violated the cardinal rule of all European colonists in America, including Great Britain herself, that the aborigines had no title to the soil which they could confer upon individuals. . . .

"It is supposed that the expedition of Walker to Nicaragua made such an unfavorable impression on public opinion there, in respect to this country, as to prepare the way for the treaty with Great Britain. A rumor was current in that quarter, and was by many believed to be true, that Walker was an agent of this Government, which, it was supposed, had covertly sent him thither to obtain control of the country. This, however, was so far from the truth that everything within its

power was done by this Government towards preventing the departure of Walker.

“Besides the treaty with Nicaragua, just adverted to, there was a treaty between Great Britain and Honduras, signed on the 28th November, 1859, the main object of which was the restitution to the latter of the Bay Islands, which had for some time before been converted into a British colony.

“This treaty also contained stipulations in regard to Mosquito Indians in Honduras territory similar to that in the treaty with Nicaragua.

“On the 30th of April, 1859, a treaty between Great Britain and Guatemala was also signed, by which the boundaries of the British settlement at Belize, so called, were extended to the Sarstoon River. This instrument contained provisions for the appointment of commissioners to mark the boundaries, and for the construction of a road from Guatemala to the fittest place on the Atlantic coast near Belize. By a supplementary convention between the parties, of the 5th of August, 1863, Great Britain agreed, upon certain conditions, to contribute fifty thousand pounds sterling towards the construction of the road referred to.

“From the note of the 4th of December last, addressed to this Department by Mr. Dardon, the minister of Guatemala here, a copy of which is inclosed, it appears that when the joint commission for running the boundary line reached the Sarstoon River the British commissioner, finding that his countrymen were trespassing beyond that limit, refused to proceed, and the stipulation on the subject, if not virtually canceled, has at least been suspended.

“The supplementary convention not having been ratified by Guatemala in season, it is stated that the British Government has notified that of Guatemala that it would regard the stipulation on the subject of the road contained in the treaty of 1859 as at an end.

“Other important information on these subjects is contained in the letter and its accompaniments of Mr. Henry Savage, to this Department of the 16th of October last, a copy of which is inclosed. He is a native of this country and at one time was consul at Guatemala.

“He has frequently, in the absence of a diplomatic agent of the United States in that quarter, furnished this Department with valuable information in regard to Central American affairs.

“Mr. Dardon says that his Government also regards its treaty of 1859 with Great Britain at an end, and requests on its behalf the cooperation and support of this Government toward preventing further encroachments by British subjects on the territory of Guatemala. It is believed that if such encroachments are authorized or countenanced by that Government it will be tantamount to a breach of its engagement not to occupy any part of Central America. Before, however, officially mentioning the subject to Earl Granville, it would be advis-

able to ascertain the correctness of the representation of Mr. Dardon, as to the cause of the discontinuance of the demarkation of the boundary.

"If the statement of that gentleman should prove to be correct, you will then formally remonstrate against any trespass by British subjects, with the connivance of their Government, upon the territory of Guatemala, as an infringement of the Clayton-Bulwer treaty, which will be very unacceptable in this country."

Mr. Fish, Sec. of State, to Mr. Schenck, min. to England, April 26, 1873, Correspondence in relation to the Proposed Interoceanic Canal (Washington, 1885), 16, 310.

See, on the same subject, Mr. F. W. Seward, Act. Sec. of State, to Mr. Pierrepont, min. to England, Sept. 11, 1877, MS. Inst. Gr. Br. XXV. 6, enclosing copy of a note from Mr. Montufar, Guatemalan Min. of For. Aff., to Mr. Evarts, Sec. of State, July 23, 1877, and Mr. Evarts' reply of Sept. 13, 1877. It is stated by Mr. Seward that General Schenck acknowledged the receipt of Mr. Fish's instruction of April 26, 1873, "but decided not to carry it into effect, until he had conferred with the minister of Guatemala at London. It can not be ascertained that he afterwards officially mentioned the subject."

It appears, however, that General Schenck reported that the British Government afterwards disclaimed "any purpose or policy . . . inconsistent with the stipulations with Nicaragua." (Mr. Fish, Sec. of State, to Mr. Williamson, min. to Costa Rica, May 3, 1875, MS. Inst. Costa Rica, XVII. 242, enclosing copy of Gen. Schenck's No. 737, of April 17, 1875.) Aug. 16, 1875, Mr. Cadwalader, Acting Sec. of State, enclosed to Mr. Williamson copy of a confidential note from Sir Edward Thornton, of Aug. 12, 1875, transmitting certain correspondence touching the relations between Nicaragua and the Mosquito territory. (MS. Inst. Costa Rica, XVII. 256.)

March 25, 1876, Mr. Fish informed Sir Edward Thornton that no objection was seen "to the appointment of Her Majesty's consul at Greytown as the agent of the Mosquito Indians to receive from . . . Nicaragua and Honduras the sums due to that tribe pursuant to treaties between those Republics and Great Britain." (MS. Notes to Gr. Br. XVII. 115.)

It has been seen that the treaty between Great Britain and Nicaragua, signed at Managua, Jan. 28, 1860, was accepted as a satisfactory settlement of the Mosquito question, on the assumption that it put an end to the British protectorate. Differences between Great Britain and Nicaragua, however, afterwards arose as to the effect of certain provisions of the treaty. Those differences were ultimately submitted to the Emperor of Austria, who, on July 2, 1881, rendered the following award:

**Award of Emperor  
of Austria, 1881.**

"ARTICLE I. The sovereignty of the Republic of Nicaragua, which was recognized by Articles I. and II. of the Treaty of Managua of the 28th January 1860, is not full and unlimited with regard to the territory assigned to the Mosquito Indians, but is limited by the self-government conceded to the Mosquito Indians in Article III. of this treaty.

"ARTICLE II. The Republic of Nicaragua, as a mark of its sovereignty, is entitled to hoist the flag of the Republic throughout the territory assigned to the Mosquito Indians.

"ARTICLE III. The Republic of Nicaragua is entitled to appoint a commissioner for the protection of its sovereign rights throughout the territory assigned to the Mosquito Indians.

"ARTICLE IV. The Mosquito Indians are also to be allowed to hoist their flag henceforward, but they must at the same time attach to it some emblem of the sovereignty of the Republic of Nicaragua.

"ARTICLE V. The Republic of Nicaragua is not entitled to grant concessions for the acquisition of natural products in the territory assigned to the Mosquito Indians. That right belongs to the Mosquito Government.

"ARTICLE VI. The Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy duties on goods imported into or exported from the territory reserved to the Mosquito Indians. That right belongs to the Mosquito Indians.

"ARTICLE VII. The Republic of Nicaragua is bound to pay over to the Mosquito Indians the arrears of the yearly sums assured to them by Article V. of the Treaty of Managua, which arrears now amount to 30,859 dol. 3 c. For this purpose the sum of 30,859 dol. 3 c., deposited in the Bank of England, together with the interest accruing thereto in the meantime, is to be handed over to the British Government. The Republic of Nicaragua is not bound to pay back-interest ('*Verzugszinsen*') on the sums in arrear.

"ARTICLE VIII. The Republic of Nicaragua is not entitled to impose either import or export duties on goods which are either imported into or exported from the territory of the free port of San Juan del Norte (Greytown).

"The Republic of Nicaragua is, however, entitled to impose import duties on goods on their conveyance from the territory of the free port of Greytown to the territory of the Republic, and export duties on their conveyance from the territory of the Republic to the free port of San Juan del Norte (Greytown)."

Moore, *Int. Arbitrations*, V. 4954.

See Mr. Evarts, Sec. of State, to Mr. Kasson, min. to Aust.-Hungary, Aug. 1, Dec. 18, and Dec. 26, 1879, and June 4, 1880, *MS. Inst. Austria*, III. 55, 78, 78, 105.

The award of the Emperor of Austria was based on a legal opinion which accompanies it. The opinion refers to the ancient dispute as to the rightful sovereignty of the territory inhabited by the Mosquito Indians. This sovereignty, says the opinion, was claimed both by Spain and afterwards by the colonies which became independent of her. On the other hand, the Mosquito Indians were able to maintain their actual freedom as a separate community, and as such formed relations with England which reached back to the second half of the seventeenth century, led in 1720 to the treaty between the governor of Jamaica and the chieftain, styled



"king," of the Mosquito Indians, and finally took the shape of a British protectorate, which was, however, contested both by the republics of Central America and by the United States. The threatened international complications, growing out of the seizure of Greytown by the Indians with the aid of England in 1848, led to the conclusion of the Clayton-Bulwer treaty, which became the starting point for fresh disputes. In consequence of the failure of the Webster-Crampton arrangement of 1852 (because of the objections of Nicaragua) and of the Dallas-Clarendon convention of 1856, Great Britain adopted the course of direct negotiations with Nicaragua, which resulted in the conclusion of the treaty of Managua of January 28, 1860. By this treaty, says the opinion, the British protectorate over the Mosquito district was expressly given up; the sovereignty of Nicaragua was acknowledged under specified conditions and engagements; and a definite territory was reserved to the Indians within which they were to enjoy the right of self-government. This territory, the opinion declares, although it forms an integral and inseparable component of the aggregate territory of Nicaragua, is to be considered as primarily and immediately owned by the Indians as their own country, which they are indirectly prohibited from ceding to a foreign power or person. Within this territory the Mosquito Indians are, by the treaty of Managua, to enjoy the right of governing according to their own customs and regulations. This concession of self-government comprehends, so the opinion affirms, the ideas of self-legislation and self-administration, as long as the Indians shall not, according to Article IV. of the treaty of Managua, agree to "absolute incorporation" into the republic and subject themselves to its general laws and regulations; it cannot extend to foreign affairs, since the Mosquito reserve forms a political and international whole with the Republic of Nicaragua. The connection of Nicaragua with the reserve may indeed, says the opinion, be shortly described in the phrase "The republic rules, but does not govern." Nicaragua, however, is entitled to hoist her flag as a sign of dominion; nor did Great Britain oppose this claim, though it formed the subject of a complaint in the memorial submitted by the Mosquito chief to the arbitrator. Nicaragua also had the right to appoint a commissioner to see that the Mosquito government did not act beyond its powers; but this commissioner must not meddle with the internal affairs of the Indians or exercise any jurisdiction in their district. On the other hand, the Indians could not be forbidden to use their old flag, but they must place in it a sign of the sovereignty of Nicaragua. As to the particular matters to which the right of self-government extended, the opinion declared that the Mosquito government must possess the right of granting licenses for the acquisition of the natural products of its territory, and of levying duties on such products; and the right of carrying on trade according to its own regulations, including the levying of duties on goods imported into and exported from the district. These rights belonged to the Mosquito Indians exclusively. With regard to Nicaragua's claim that Great Britain had no right to interfere in affairs relating to the Mosquito Indians and to the free port of Greytown, or to come forward as a complainant in the pending case, since such a proceeding would involve a reassertion of her relinquished protectorate, the opinion pronounced the contention not to be well founded. England, said the opinion, had the right to insist that the provisions of the treaty of Managua, constituting Greytown a free port, should not be merely nominal, and, if

her subjects residing in Greytown or trading thither asked her interposition against measures of Nicaragua prejudicial to the character of Greytown as a free port, there was nothing contrary to the rules of international law or to ordinary practice in her intervening. As to the affairs of the Mosquito Indians, it was true, said the opinion, that England had in the treaty of Managua acknowledged the sovereignty of Nicaragua and renounced her protectorate, but only on the condition, set forth in the treaty, of certain political and pecuniary advantages to the Indians, and she had the right to insist upon the fulfilment of those promises as well as of all other clauses of the treaty. Nicaragua was wrong in calling this an inadmissible "intervention," since pressure for the fulfilment of treaty engagements was not to be classed as an intermeddling with internal affairs, nor as an exercise of the relinquished protectorate. In conclusion, the opinion advised that the arbitrator should decline to comply with the request of Nicaragua that he should declare that the treaty of Managua was, as having accomplished its purpose, annulled in respect of the Mosquito territory, since he was empowered only to interpret the treaty and not to supersede it.

The full text of the opinion may be seen in Moore, *International Arbitrations*, V. 4955-4966.

The foregoing award and opinion have become obsolete as the result of the voluntary and formal incorporation of the Mosquito Indians into the Republic of Nicaragua. (For. Rel. 1894, Appendix I. 354-363; *infra*, pp. 250-253.)

"On the fifteenth ultimo Dr. Horacio Guzman, the minister of Nicaragua at this capital, in pursuance of instructions received from his Government, left at this Department a copy of a note addressed by Mr. J. P. H. Gastrell, the British minister in Central America, to the minister of foreign affairs of the Republic of Nicaragua, a copy of which I inclose herewith.

Mr. Bayard's instructions to Mr. Phelps, Nov. 23, 1888.

"In this note Mr. Gastrell complains that the Government of Nicaragua 'has established a post-office at Bluefields, thus intervening in the domestic affairs of the reservation;' that 'troops and a police force have been stationed, and forts, arsenals, and military posts have been established, or are about to be established, by Nicaragua' within the Mosquito Reservation, and that the Nicaraguan commissioner residing in the reservation sustains these acts. He states that, in the opinion of Her Majesty's Government, the erection of forts, arsenals, or military posts, the establishment of post-offices by Nicaragua, or the exercise of military or police authority within the territory of the reservation can not be reconciled with the spirit of the treaty of Managua of 1860, as interpreted by the award of the Emperor of Austria. And he refers to certain questions touching the precise boundary of the reservation, as to which some dispute still exists.

"Touching the inquiry in regard to the demarkation of the boundaries of the reservation, I have no observations to offer. The matter is one in which the Government of the United States feels at least an

equal interest with that of Great Britain, inasmuch as a number of our citizens are now engaged in business within the reservation and by far the larger part of the foreign commerce of that region is at present carried on between the ports of Bluefields and New Orleans.

"But with respect to the other subjects mentioned by Mr. Gastrell the case is different. . . .

"The Mosquito coast was a name bestowed in the last century upon a tract of country of considerable but imperfectly defined extent, stretching along the shores of the Caribbean Sea to the southward and westward of Cape Gracias à Dios, and was inhabited by a sparse population of wholly uncivilized Indians, between whom and the inhabitants of the British colony of Jamaica some relations are said to have early existed. . . . It is enough for my present purpose to point out that this Government has at all times maintained that the title to the whole of the Mosquito coast was, in the last century, vested in the Crown of Spain; that the native inhabitants were never more than a mere savage tribe, having at best only possessory rights in the region they occupied; that the sovereignty of Spain was distinctly recognized by Great Britain in the treaties concluded with the Spanish Government in 1783 and 1786; and that the rights of Spain became vested in her revolting colonies when they secured their independence.

"These views were not accepted by the British Government, which insisted upon regarding the Mosquito Indians as an independent nation, entitled to full recognition as such. The chief of the tribe was described in the British correspondence as the Mosquito King, and Great Britain was designated as his protecting ally. Acting upon this view of the case, two British frigates, on January 1, 1848, took forcible possession of the town of San Juan del Norte—subsequently known as Greytown—which had a peculiar importance to the people of the United States as being situated at the Atlantic mouth of the projected Nicaragua interoceanic canal. For upward of twelve years the protectorate of Great Britain thus established continued.

"These pretensions on the part of Great Britain excited marked interest and opposition in the United States, and together with other circumstances, became the cause of the negotiation of the Clayton-Bulwer treaty of April 19, 1850. . . .

"Into the irritating controversies to which this treaty gave rise I do not desire to re-enter, but it is enough to point out that the continuance of the protectorate of Great Britain over the Mosquito territory was regarded throughout by the United States as being in conflict with the provisions of that agreement.

"The arrangements to be entered into upon the cessation of this Mosquito protectorate were, however, the cause of considerable embarrassment to the British Government, as was frankly pointed out in two instructions addressed by Lord John Russell to Mr. Crampton,

under date of January 19, 1853, from which I quote the following passages:

"It is evident that since Great Britain first assumed the protection and defence of the Mosquito Indians the position of all parties has changed.

"*First.* Spain, instead of exercising absolute sovereignty over Central America and prohibiting all commerce on the coasts under her sway, has entirely lost her dominion over the continent from Cape Horn to Florida.

"*Second.* The Mosquito Indians, instead of governing their own tribe according to their own customs, furnish a name and a title to Europeans and Americans, who carry on trade at Greytown and along the coast of Mosquito according to the usages of civilized nations.

"*Third.* Great Britain, instead of having an interest in the defense of the Mosquito Indians for the sake of rescuing part of the territory of Central America from Spanish control, and obtaining an outlet for her commerce, has no other interest in Mosquito than that which is derived from an honorable regard for her old connection with the Indian nation of Mosquito.

"Her Majesty's Government has for several years endeavored to suit its engagements to the altered circumstances of the case.

"The committee of government of Greytown are, in fact, the real power which exercises authority in that part of Central America. . . . What is apparent is, that the King of Mosquito exercises sovereignty over Greytown; what is real is, that he has no authority whatever, but that a committee of Europeans and Americans carry on the government at that port.

"It is the object of Her Majesty's Government to make Mosquito a reality instead of a fiction, which it has hitherto been; and provided we save our honor and credit in our treatment of the King of that country, whose title and power are, in truth, little more than nominal, it is a matter of comparative indifference to us how this object is carried out, whether by constituting Greytown as the head and pivot of the new territorial establishment which we desire to see formed, or by any other liberal and practical arrangement which may be thought preferable, on discussing the matter with the United States. . . . Neither would it consist with our notions of expediency that such States as Nicaragua, Honduras, or even Costa Rica, should obtain possession of the Mosquito territory.

"The plans of settlement thus suggested by Lord John Russell were not approved by the United States, and prolonged but fruitless negotiations were undertaken in the hope of arriving at an arrangement with respect not only to the Mosquito coast, but also to the British claims over certain islands off the coast of Honduras. Ultimately the Government of Great Britain sent Sir William Gore Ouseley as its representative to Central America, with the purpose of concluding separate agreement with the several countries interested. This mission was carried on and brought to a successful conclusion by Mr. Wyke.

"It is interesting to observe that the plan adopted in regard to the mode of dealing with the Mosquito Indians seems to have been first suggested by General Cass in a conversation with Lord Napier, which is related as follows by the latter in a dispatch to Lord Clarendon of March 12, 1857:

"General Cass then passed some reflections on the Clayton-Bulwer treaty; he had voted for it, and in doing so he believed that it abrogated all intervention on the

part of England in the Central American territory. The British Government had put a different construction on the treaty, and he regretted the vote he had given in its favor. He did not, however, pretend that the British Government should now unconditionally abandon the Mosquitos, with whom they had relations of an ancient date; it was just and consistent with the practice of the United States that those Indians should be secured in the separate possession of lands, the sale of which should be prohibited, and in the enjoyment of rights and franchises, though in a condition of dependency and protection. The British Government had already removed one impediment to the execution of the Bulwer-Clayton treaty by the cession of their claims on Ruatan. Two difficulties now remained—the frontier of Belize and the delimitation and settlement of the Mosquito tribe. If the frontier could be defined, and if the Mosquitos could be placed in the enjoyment of their territory by treaty between Great Britain and Nicaragua, in which the concessions and guaranties of the latter in favor of the Indians should be associated with the recognition of the sovereignty of Nicaragua—so I understood the general—then the Bulwer-Clayton treaty might be a permanent and satisfactory settlement between the contracting parties. The United States desired nothing else than an absolute and entire neutrality and independence of the Central American region, free from the exercise of any exclusive influence or ascendancy whatever.

“On January 28, 1860, a convention, sometimes known as the Zeledon-Wyke treaty, was signed at Managua by the representatives of Great Britain and Nicaragua. By the terms of this treaty Her Britannic Majesty, subject to the conditions and engagements specified therein, agreed to recognize as belonging to and under the sovereignty of the Republic of Nicaragua, the country theretofore occupied or claimed by the Mosquito Indians within the frontier of that Republic. The British protectorate was to cease three months after the exchange of ratifications, in order to enable Her Majesty's Government to give the necessary instructions for carrying out the stipulations of the treaty. A district, now commonly known as the Mosquito Reservation, was to be assigned to the Indians, within which they were to enjoy certain rights of local autonomy. The Republic of Nicaragua was to pay to the Indians \$5,000 a year for ten years. The port of Greytown, which was not included in the Mosquito Reservation, was to be constituted a free port. And certain grants of land, if made bona fide, in the name and by the authority of the Mosquito Indians, since January 1, 1848, lying outside the reservation, were to be confirmed.

“Articles II., III., and VI. of this treaty may be quoted in full as follows:

“Art. 2. A district within the territory of the Republic of Nicaragua shall be assigned to the Mosquito Indians; which district shall remain, as above stipulated, under the sovereignty of the Republic of Nicaragua. Such district shall be comprised in a line which shall begin at the mouth of the River Rama, in the Caribbean Sea; thence it shall run up the mid-course of that river to its source, and from such source proceed in a line due west to the meridian of 84° 15' longitude west from Greenwich; thence due north up the said meridian until it strikes the River Hueso, and down the mid-course of that river to its mouth in the sea, as laid down in Baily's map, at about latitude from 14° to 15° north and longitude

83° west from the meridian of Greenwich; and thence southerly along the shore of the Caribbean Sea to the mouth of the River Rama, the point of commencement. But the district thus assigned to the Mosquito Indians may not be ceded by them to any foreign person or state, but shall be and remain under the sovereignty of the Republic of Nicaragua.

"Art. 3. The Mosquito Indians, within the district designated in the preceding article, shall enjoy the right of governing, according to their own customs and according to any regulations which may from time to time be adopted by them, not inconsistent with the sovereign rights of the Republic of Nicaragua, themselves and all persons residing within such district. Subject to the above-mentioned reserve, the Republic of Nicaragua agrees to respect and not to interfere with such customs and regulations so established or to be established within the said district.

"Art. 6. Her Britannic Majesty engages to use her good offices with the chief of the Mosquito Indians, so that he shall accept the stipulations which are contained in this convention.

"The conclusion of this arrangement was officially communicated to the Government of the United States, which, regarding it as a final withdrawal of British influence from the Mosquito country, expressed its satisfaction at a settlement that appeared to put an end to the disputes to which the Clayton-Bulwer treaty had given rise.

"The treaty of Managua was at least as favorable to Great Britain as that Government had any right to expect. As pointed out by Mr. Fish in his instructions to General Schenck of April 26, 1873, this instrument 'assigned boundaries to the Mosquito Reservation probably beyond the limits which any member of that tribe had ever seen, even when in chase of wild animals. Worst of all, however, it confirmed the grants of land previously made in the Mosquito territory. The similar stipulation on this subject in the Dallas-Clarendon treaty was, perhaps, the most objectionable of any, as it violated the cardinal rule of all European colonists in America, including Great Britain herself, that the aborigines had no title to the soil which they could confer upon individuals.'

"The Government of the United States had not, however, anticipated that under cover of this treaty the Government of Great Britain would continue to attempt any interference with the affairs of the Mosquito Indians. It is superfluous to say that if it had been supposed by the United States that the treaty of Managua was understood by the Government of Great Britain to give that country a right of influence, direction, or control over the destinies of the Mosquito territory as against the State of Nicaragua, that convention, far from being hailed by this Government as a solution and termination of disputes concerning the British protectorate over the Mosquito Indians, would have been regarded as a serious obstacle to any such settlement. Under Article VI. of the treaty of Managua, Her Britannic Majesty was bound to use her good offices with the chief of the Mosquito Indians, so that he should accept the stipulations of that convention; and it might have been naturally assumed that upon such

acceptance by the Mosquito chief, Her Majesty's right to further interference was at an end.

"That this Government was justified in so assuming, may amply be demonstrated not only by the consideration of the expressed design of the convention, but also by its particular provisions. Among these may be designated as of unequivocal significance, the fourth article of the treaty, by which it is provided that nothing in the treaty shall be construed to prevent the Mosquito Indians at any future time from agreeing to absolute incorporation into the Republic of Nicaragua on the same footing as other citizens of the Republic, and from subjecting themselves to be governed by the general laws and regulations of the Republic, instead of by their customs and regulations. This provision merely emphasizes the fact of the actual, substantial incorporation of the Mosquito Indians into the Republic of Nicaragua, and clearly contemplates the ultimate and absolute extinguishment of their semi-segregated existence.

"It appears, however, that differences subsequently arose between the Governments of Great Britain and Nicaragua in relation to the free port of Greytown, the payment of the annuity to the Mosquito Indians, and the precise extent of the rights of Nicaragua within the Indian reservation. By an exchange of diplomatic notes between the representatives of Great Britain and Nicaragua, it was agreed that all of these questions should be submitted to the arbitration of the Emperor of Austria; and he in the month of April, 1879, consented to act as arbitrator upon the differences of opinion which had arisen 'as to the true interpretation of the treaty of Managua of 1860.'

"To this agreement of arbitration the Government of the United States was not a party, and it is not bound by the award of the arbitrator, nor committed in any way to an admission of the right of Great Britain to interfere in disputes between the Republic of Nicaragua and the Indians living within her borders.

"The decision of the Emperor was announced in July, 1881, and the first six articles of the award, which deals with the rights of Nicaragua within the Mosquito Reservation, are as follows: [For the first six articles of the award, here quoted, see *supra*, p. 224.]

"This award, as it will be perceived, does not by any means go to the lengths to which the British Government now seeks to proceed, under the recent note of Mr. Gastrell to the Nicaraguan authorities. The award declares that the Republic of Nicaragua may hoist its flag throughout the reservation, and may appoint a commissioner for the protection of its sovereign rights; but that it may not grant concessions for the acquisition of natural products within the territory, may not regulate the trade of the Indians, and may not levy import or export dues in the reservation. Beyond this no limitation is declared upon the sovereign rights of Nicaragua, nor is the extent of its sovereignty further defined.

“Without entering now into the consideration of the correctness of this award, it may be pointed out that neither in it, nor in Article III. of the treaty of Managua, which provided that the Indians were to enjoy the right of governing, according to their own customs, and according to any regulations which may from time to time be adopted by them not inconsistent with the sovereign rights of the Republic of Nicaragua, themselves and all persons residing within such district, is there anything incompatible with the right of Nicaragua to establish post-offices, and still more with the right to establish military posts for the common defense. Such a right is an essential incident of paramount sovereignty, and can properly be exercised by no other agency. The award refers to the right of the Republic of Nicaragua as a mark of its sovereignty to hoist the flag of the Republic throughout the territory assigned to the Mosquito Indians. That such is the case does not appear to admit of doubt. Yet it seems idle to speak of a government having the right to hoist a flag as the emblem of a sovereignty which it is not to be permitted to defend.

“The analogy of the relations of the Federal Government of the United States to the several States and to the Indian tribes within its borders seems clear and applicable. To establish post-offices, to raise and support armies, to provide and maintain a navy, to exercise exclusive legislation over all places purchased for the erection of forts, magazines, arsenals, and dock-yards, and to provide for the common defense and general welfare of the United States, are powers expressly vested by our Constitution in the Federal Congress; and it is obvious that wherever there is a central government these powers, or something like these, must be vested in it, whatever degree of autonomy in other respects may be accorded to local administrations.

“It is, of course, well known that in some cases dependent autonomous communities have the privilege of exercising some of the rights above mentioned; but this is due usually either to the circumstance of great distance from the central authority, as in the case of the British colonies in Australia, or to special and precise stipulations. In a case where the inhabitants of a district are simply to enjoy a right of local self-government, ‘but shall be and remain under the sovereignty of’ the power within whose borders their district lies, there can be no room for implication granting to such inhabitants extraordinary privileges which do not properly pertain to the regulation of strictly local affairs.

“To the United States, in common with all other powers, it is important that Nicaraguan sovereignty should exist in fact as well as in name within the Mosquito reservation. With the sovereign alone can we maintain diplomatic relations, and we have a right to look to that sovereign for redress in the event of wrongs being inflicted upon any of our citizens. If the Republic of Nicaragua is to be limited to the mere formal right of hoisting a flag and maintaining a commis-



sioner within the reservation, how can it be called upon to perform any of its international obligations?

"Nor is it consistent with the general views and policy of the United States to look with favor upon the establishment of such an *imperium in imperio* in Central America. General Cass, in a note addressed to Lord Napier on May 29, 1857, in discussing the draught of a proposed treaty relative to the Bay Islands off the coast of Honduras, alluded in the following language to certain clauses which, by their express terms, were remarkably similar to the interpretation now sought to be put by the British Government on the treaty of Managua. He wrote:

"That provision, whilst declaring the Bay Islands to be 'a free territory under the sovereignty of the Republic of Honduras,' deprived that country of rights without which its sovereignty over them could scarcely be said to exist. It separated them from the remainder of Honduras and gave them a government of their own, with their own legislative, executive, and judicial officers, elected by themselves. *It deprived the Government of Honduras of the taxing power in every form, and exempted the people of the Bay Islands from the performance of military duty, except for their own defense, and it prohibited the Republic from providing for the protection of these islands by the construction of any fortifications whatsoever,* leaving them open to invasion from any quarter. Had Honduras ratified this treaty, she would have ratified the establishment of an 'independent' state within her own limits, and a state at all times liable to foreign influence and control.

"And these objections Mr. Cass thought were so serious as to make it impossible for the President to sanction such an arrangement.

"But even more important than a determination of the precise extent of the Nicaraguan authority within the Mosquito reservation is the general question of the right of Her Britannic Majesty to intervene in disputes between the Republic of Nicaragua and the Indians or other inhabitants of that district.

"The question was presented by the Nicaraguan representatives to the Emperor of Austria, but his award is silent upon the point. It is, however, discussed in the opinion or report upon which the award is based, and in the following terms:

"In regard, however, to the affairs of the Mosquito Indians, it is true that England, in the treaty of Managua, has acknowledged the sovereignty of Nicaragua and renounced the protectorate, but this still only on condition, set forth in the treaty, of certain political and pecuniary advantages for the Mosquitos ('subject to the conditions and engagements specified in the treaty, Article I'). England has an interest of its own in the fulfillment of these conditions stipulated in favor of those who were formerly under its protection, and therefore also a right of its own to insist upon the fulfillment of those promises as well as of all other clauses of the treaty. The Government of Nicaragua is wrong in calling this an inadmissible 'intervention,' inasmuch as pressing for the fulfillment of engagements undertaken by treaty on the part of a foreign state is not to be classified as intermeddling with the internal affairs of that state, which intermeddling has unquestionably been prohibited under penalty. No less unjustly does the Government of Nicaragua seek to qualify this insistence on treaty claims as

a continued exercise of the relinquished protectorate, and on that ground wish to declare England's interposition inadmissible.

"From this view of the case I find myself compelled to dissent. It can not be admitted that Great Britain has a right to intervene in every dispute that may arise between the Mosquito Indians and their sovereign. And if Great Britain can not intervene in every case, how are the cases of admissible intervention to be defined? Certainly the vague language of the treaty of Managua can afford no criterion, for in every case of dispute it may be argued that the rights of self-government on the one hand, or of sovereignty on the other, are invaded.

"The case is not without analogies. In the treaty with France of April 30, 1803, for the cession of Louisiana it is provided that 'the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.' In the treaty with Spain of February 22, 1819, for the cession of Florida, it was stipulated that 'the inhabitants of the ceded territories shall be secured in the free exercise of their religion, without any restriction,' and that they should be 'admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.' By the terms of the treaty with Russia of March 30, 1867, for the cession of Alaska, the inhabitants, with the exception of uncivilized native tribes, are to be admitted to citizenship, 'and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country.' In all these cases, as will be observed, the ceding Government has received assurances of the treatment to be accorded to the inhabitants of the ceded territory; but in no case in our diplomatic history has any one of these Governments asserted a right to intervene in our domestic affairs. Difficulties have at times arisen between the Federal Government and the inhabitants of Louisiana and Florida, but neither France nor Spain ever pretended that our treaty stipulations gave them a right to take part in the settlement of such disputes. The laws affecting the Territory of Alaska may be, and in some respects now are, unlike those governing the other Territories of the United States. But it must be apparent that were the Indians inhabiting those possessions to protest against alleged discriminations to the Czar of Russia, the treaty of 1867 would not authorize His Imperial Majesty to demand of the United States a different treatment of our

Indian wards; and that such interposition, if made, would certainly not be regarded favorably by this Government.

"The ceding government in such cases retains, and can retain, no right of control or supervision over the conduct of the guardian to whom it commits the inhabitants whose allegiance is changed.

"And so in the case under consideration. The stipulations of the treaty of Managua relative to the privileges to be accorded to the Mosquito Indians were not for the benefit of Great Britain, and are not enforceable by her. They were solely made for the benefit of those Indians, who were regarded by the express language of the treaty as at liberty to accept or reject its stipulations. Through their chief they did deliberately accept them, and on the withdrawal of British protection placed themselves under the sovereign power of the Republic of Nicaragua, and agreed to accept her public pledges as a sufficient guaranty that the agreements therein contained touching their right of self-government would be carried out in good faith.

"The President can not but regard the continued exercise of the claim on the part of Great Britain to interfere on behalf of these Indians as the assertion of a British protectorate in another form; more especially when this effort is directed to prohibiting Nicaragua from exercising military jurisdiction in the immediate neighborhood of the Atlantic mouth of the projected canal.

"The United States can never see with indifference the re-establishment of such a protectorate. Not only would the extension of European influence upon this continent be contrary to the traditional and frequently expressed policy of the United States, but the course of Great Britain in assuming or exercising any dominion over the Mosquito coast, or making use of any protection it may afford or any alliance it may have to or with any people for the purpose of assuming or exercising any dominion over that territory, would be in violation of the express stipulations of the Clayton-Bulwer treaty, whose binding force Great Britain has up to the present time so emphatically asserted.

"It is not needful in this communication to consider the temporary or perpetual existence of the various provisions of that treaty. My immediate predecessors have with great fullness expressed their views upon that head, and I do not now comment upon them. But it is proper to refer to these conventional engagements of Great Britain, as exhibiting the measure of her admitted obligations.

"Whether the interference of the British Government be regarded as a breach of existing treaty engagements, or whether it be looked upon simply as an effort, not prohibited by express agreement, to extend her influence in this continent—in either case the Government of the United States can not look upon such acts without concern. The circumstances of the particular locality render the subject one of peculiar interest and importance to the people of this country, and

I should be wanting in my duty to them should I fail to bring the matter directly and frankly, and in a spirit of sincere friendship, to the notice of Her Majesty's Government.

"The history of the former controversies in regard to the same subject should admonish those who are charged with the conduct of the affairs of the two countries to spare no effort to avoid misunderstandings and promote cordial co-operation and good intelligence between them. With this purpose in view, and animated by the strongest desire to escape possible future causes of difference, I address you these instructions.

"You will read this dispatch to the Marquis of Salisbury, and, should he desire it, you may furnish him with a copy."

Mr. Bayard, Sec. of State, to Mr. Phelps, min. to England, Nov. 23, 1888,  
For. Rel. 1888, I. 759-767.

To the foregoing representations of Mr. Bayard, Lord Salisbury replied in the following March. In this reply his

Lord Salisbury's  
reply, March 7, 1889.  
lordship, after referring to the positions taken by Mr. Bayard, said:

"I may remark that the award of the Emperor was given more than seven years ago, and no objection has, till now, been made to it by the United States Government.

"If the object contemplated by Her Majesty's Government had been an unconditional withdrawal of the protectorate of Great Britain, no convention would have been required or made; but Nicaragua entered into a distinct treaty arrangement with this country to secure certain rights and privileges to the Mosquito Indians as soon as the British protectorate should be withdrawn; and in the event, which has arisen, of the Mosquito Indians complaining that their rights are infringed by Nicaragua, by whom is remonstrance to be made to Nicaragua unless by Great Britain, with whom she has concluded the convention in question?

"Mr. Bayard quotes as analogous to the present issue the treaty between the United States and France, Spain, and Russia for the cession, respectively, to the United States of Louisiana, Florida, and Alaska, and he states that although difficulties have at times arisen between the Federal Government and the inhabitants of Louisiana and Florida, neither France nor Spain ever pretended that the treaty stipulations gave them a right to take part in the settlement of such disputes, and that were the Indians of Alaska to protest against alleged discriminations between the laws governing that Territory and the other Territories of the United States, the Emperor of Russia would not be authorized by the treaty of 1867 to demand a different treatment of those Indians. Mr. Bayard does not, however, say whether such intervention was, as in the present case, invoked by the inhabitants concerned, or whether the differences to which he refers were of a kind provided for in the treaties which he mentions.

"Certain advantages were by the convention of 1860 secured to the Indians of the Mosquito Reserve, and Her Majesty's Government felt themselves in duty bound to bring to the notice of the Nicaraguan Government the cases specified in Mr. Gastrell's note. Mr. Bayard is, however, under a misapprehension as to the extent of the intervention exercised by Her Majesty's Government. They do not claim 'to intervene in every dispute between the Mosquito Indians and their sovereign,' but only within the limits of the report annexed to the Emperor of Austria's award quoted by Mr. Bayard.

"They have no desire to 'assert a protectorate' in substance or in form, or anything in the nature of a protectorate, and it would give them the greatest possible satisfaction if the Nicaraguan Government and the Indians would come to an amicable arrangement, under Article IV. of the convention, and thus relieve this country from any further responsibility in regard to their affairs.

"I have to request that you will read this dispatch to the Secretary of State, and leave a copy of it with him, and you may inform him that I have recently received from the Nicaraguan minister at this court, a note giving explanations in reply to the representations made in Mr. Gastrell's note of the 10th September last."

The Marquis of Salisbury to Mr. Edwardes, British chargé, March 7, 1889,  
For. Rel. 1889, 468, 469.

**Mr. Foster's representations, Feb. 8, 1893.**

In May, 1892, the Government of the United States addressed to that of Nicaragua a communication concerning a reported increase in port charges at Bluefields, in the Mosquito Reservation, on steamers plying between New Orleans and that place. The Nicaraguan Government answered that it was unable to make a responsible reply, owing to the anomalous state of things existing in the Reservation, but intimated that it would address the British Government, to the end that Nicaraguan sovereignty there, under the treaty of Managua, might be invested with a practical meaning. Sept. 13, 1892, Señor Bravo, the Nicaraguan minister of foreign affairs, accordingly addressed a note on the subject to Mr. Gosling, British minister at Managua. To this note Mr. Gosling, on Oct. 14, 1892, replied, announcing that he had referred it to Lord Rosebery, but at the same time making certain observations of his own. When this correspondence was brought by the Nicaraguan Government to the attention of the United States, Mr. Foster, who was then Secretary of State, addressed to Mr. Lincoln, American minister in London, an instruction, in which some of Mr. Gosling's statements were examined and the question at issue discussed. On the general subject of the Mosquito Indians, Mr. Foster referred to Mr. Bayard's instruction to Mr. Phelps, of Nov. 23, 1888, a presentation which, said Mr. Foster, remained practically unanswered, since Lord Salisbury's acknowledgment amounted to little more than an excep-

tion to certain details. After adverting to Mr. Bayard's argument that the pretensions of Great Britain with regard to the Mosquito country involved the assertion of an *imperium in imperio*, Mr. Foster said:

"Indeed, throughout the whole discussion for many years past it seems to have been overlooked on the part of Great Britain that the concessions granted by Nicaragua are tribal, not territorial; and that the specified rights conferred are to be enjoyed by a particular community of indigenous Indians, thus inuring to them and not to the territory assigned for their residence. The residence of other persons than Mosquito Indians within the defined limits of the reservation imposes subjection to this tribal rule; it does not secure their exemption from Nicaraguan control. . . . Mr. Gosling asserts that 'the right of self-government' conceded to the Mosquito Indians by the Article III. of the treaty of Managua would surely 'cover the framing by them of port regulations whereby to insure the due maintenance and safety of the harbor at Bluefields, the providing of lights and beacons, and the defraying of expenses of the police of that port,' and adds: 'According to my view, the question to be considered is, whether the levying of port dues referred to is inconsistent with the sovereign rights of Nicaragua; whether or not the collection of the said dues is not absolutely necessary for the safety of navigation, and whether the supreme government has, in virtue of the treaty of Managua, the right to repudiate them.'

"To this concluding proposition, as well as to the prefatory assertion above quoted, I am constrained to take exception. . . . The port of Bluefields, like any other port within the defined limits of the reservation assigned for the dwelling of the Mosquito Indians, is for all purposes of international commerce a port of the sovereign state of Nicaragua. The flag of Nicaragua floats there as the recognized symbol of supreme sovereignty. The foreign flag entering those ports can recognize no divided sovereignty, nor know any such governmental fiction as 'Mosquitia.'

"Should foreign rights be involved or foreign interests assailed in those ports, the foreign sovereign can look alone to the Republic of Nicaragua for redress. If there be question 'whether or not the collection of port dues is not absolutely necessary for the safety of navigation,' I hold that it is the prerogative of Nicaragua to determine the point, and in the proper case to adjust and impose such dues. . . .

"I am not unmindful of the circumstance, which may perhaps be alleged, that Article VI. of the arbitral decision of the Emperor of Austria provided that 'the Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy duties on goods imported into or exported from the territory reserved to the Mosquito Indians. That right belongs to the Mosquito Indians.' As was declared by Mr. Bayard, in his dispatch of November 23, 1888, the

Government of the United States was not a party to that agreement of arbitration, and is not bound by the award of the arbitrator. But, even admitting for the argument's sake that the award of the Emperor of Austria recognizes the competence of the tribal Indian community to levy import or export duties on goods, I submit that the scope of that power is expressly defined and limited to the Mosquito Indians alone, subject always to the ultimate sovereignty of Nicaragua, and . . . that the apparent intendment of this dictum of the imperial arbitrator was to permit of the collection by the Mosquito Indians of a revenue to meet the needs of their permitted tribal administration, and does not cover the case of the exaction, by aliens residing within the limits of the reservation, of local port charges for purposes of local improvement which are normally within the sole control of the territorial sovereign.

“For some fifty years past this matter of Great Britain's pretension to exercise a more or less direct intervention in the regulation of the internal functions of the Republic of Nicaragua has from time to time excited discussion. . . . Notwithstanding this seemingly final withdrawal [by the treaty of Managua] of the British claims to intervention in the affairs of Nicaragua, the extent to which they were subsequently revived and asserted is apparent from the necessity of recourse to arbitration in 1879-'81. The question of the right and scope of Great Britain's claimed function of intervention in disputes between the Republic of Nicaragua and the Indians or other inhabitants of the Mosquito Reservation was brought before the arbitrator, and his formal award is silent upon this point. Resting, however, on a passage of the opinion or report upon which the award was based, and which purports to recognize the competency of Great Britain to insist upon the fulfillment of the stipulations of the treaty of Managua, Her Majesty's Government has since stretched its claim so far as to intervene to contest the exercise of so evidently sovereign a function as the regulation of postal communication in the Indian reservation—as though it were possible to suppose that the phantasmic fiction styled ‘Mosquitia’ were competent to enter into postal conventions with sovereign powers and logically (or illogically, rather), with the territorial sovereignty of Nicaragua itself. . . . The town of Bluefields is to all intents and purposes a colony of aliens, for the most part Jamaicans, in whose municipal administration of affairs no concurrence of the tribal chiefs of the reservation is apparent. Thus the right conceded to the Mosquito Indians by the treaty of Managua of governing, according to their own customs, themselves and all persons residing within the district reserved to them has been perverted into the erection of an alien settlement at Bluefields, self-administered, internationally irresponsible, as wholly withdrawn in fact from the indigenous tribal regimen of the Mosquito Indians as it seeks to withdraw itself from the sovereign control of Nicaragua, and prone to invoke British

intervention in protection of its alien interests. It is scarcely necessary here to discuss how far this foreign and local self-control comports with the arbitral decision of the Emperor of Austria, which in each and every one of its six essential articles defines in terms the relations of the 'Mosquito Indians,' and none others.

"The United States can not look with favor upon any attempt, however indirect, on the part of Great Britain, to render illusory the sovereignty of the Republic of Nicaragua over the Mosquito Indians and the territory reserved for their dwelling. In the judgment of this Government the provisions of the treaty of Managua, as construed by the arbitral award of the Emperor of Austria, are explicit to obviate any misapprehension or doubt as to the respective rights of Nicaragua and the Mosquito Indians, or as to the right of the Mosquito Indians themselves to impose their tribal customs and regimen upon any other residents within the reservation, so far as may not be incompatible with the sovereignty of Nicaragua. Moreover, the attributes and powers of sovereignty are so unquestionably established under the law of nations as to leave no just ground for doubting or contesting the ultimate rights of Nicaragua as territorial sovereign. Hence, the Government of the United States must hold that to Nicaragua, and to Nicaragua alone, it must look for settlement of any international questions affecting any part of the territory of Nicaragua.

"You will communicate this dispatch to the Earl of Rosebery by reading it to him, and should he so desire, furnishing him with a copy."

Mr. Foster, Sec. of State, to Mr. Lincoln, min. to England, Feb. 8, 1893, For. Rel. 1893, 313. This paper was communicated by Mr. Lincoln to Lord Rosebery, March 1, 1893. (For. Rel. 1893, 321.)

See, also, Mr. Shannon, min. to Nicaragua, to Mr. Foster, Sec. of State, Aug. 17, Sept. 28, and Nov. 9 (enclosing copy of Mr. Gosling's note of Oct. 14 to Señor Bravo), 1892, For. Rel. 1893, 163, 170, 172, 173; and Mr. Foster to Mr. Shannon, Feb. 10, 1893, id. 182.

As to the free port of Greytown, under the treaty of Managua, see Mr. Day, Assist. Sec. of State, to Señor Correa, Nov. 10, 1897, MS. Notes to Nicaraguan Leg. II. 172.

In the Autumn of 1893 the Government of Nicaragua sent to the Mosquito Reservation Señor O. Lacayo, as a special commissioner, with instructions to bring about, if possible, by diplomatic methods, its complete incorporation into the republic. He was accompanied in his mission by a military official, Gen. R. Cabezas, who was styled inspector-general of the coast. Señor Lacayo arrived at Bluefields on Nov. 2, 1893, and proceeded thereafter in various ways to assert his authority.<sup>a</sup> At the same time he entered into negotiations with the Mosquito officials, with a view to induce them to abdicate their functions. The political authority of the Reservation was then in the

Insurrection of  
1894, and subse-  
quent events.

<sup>a</sup>For. Rel. 1894, App. I. 262.



hands of practically the same group of persons as had exercised it for some years, the leaders being two natives of Jamaica, named Cuthbert and Thomas, both of whom claimed British nationality. The Indians themselves knew little of the government as it existed.<sup>a</sup> The effort to induce the officials by negotiation to yield their authority did not succeed, and Señor Lacayo then asked his Government for troops on the ground that the Mosquito chief, Robert Henry Clarence, and his council, were disloyal.<sup>b</sup> In December 1893 an excitement arose at Bluefields, owing to rumors of a threatened invasion of the Reserve from Honduras, with which country Nicaragua was then at war; and when Nicaraguan troops were sent to Bluefields, the Mosquito chief protested against their presence, and a Mosquito official called on Señor Lacayo and demanded their withdrawal or the surrender of their arms. With this demand Señor Lacayo declined to comply, referring to the existence of war with Honduras and the right of Nicaragua to defend the territory. Dec. 15, 1893, however, the troops were sent forward to the Honduran frontier. A company of natives was then organized and armed for local defense, and a question arose as to its control. Meanwhile citizens of the United States residing in the Reservation petitioned for the presence of an American man of war.<sup>c</sup>

On February 11-12, 1894, Nicaraguan forces occupied Bluefields, took possession of the public buildings, raised the Nicaraguan flag on the Mosquito flagstaff, proclaimed a state of siege (martial law), and assumed control of the government. Coincidentally, Señor Lacayo issued a proclamation, in which he referred to the existence of war with Honduras, and declared that the object of the presence of the troops was to give the people and their property the protection of the Nicaraguan flag and forces.<sup>d</sup> A number of American citizens, engaged in business at Bluefields, presented to Mr. Seat, the United States consular agent, a petition, protesting against the state of siege, as well as against the substitution of Nicaraguan for Mosquito rule, and expressing apprehension that their rights and interests would not be protected.<sup>e</sup> Señor Lacayo, to whom the petition was communicated by Mr. Seat, promised to transmit it to his Government.<sup>f</sup> On the 19th of February he issued an order requiring importations to be made at Bluefields under the Nicaraguan laws and regulations.<sup>g</sup> The

<sup>a</sup>For. Rel. 1894, App. I. 234-236. See, as to the work of the Moravian mission among the Indians, id. 263, 286.

<sup>b</sup>For. Rel. 1894, App. I. 288.

<sup>c</sup>For. Rel. 1894, App. I. 237.

<sup>d</sup>For. Rel. 1894, App. I. 245-249, 261.

<sup>e</sup>For. Rel. 1894, App. I. 246. See, also, as to the attitude of the American residents, and the state of local feeling, id. 266, 273-275, 279-284, 289-290, 293, 295, 317, 324, 342, 344, 347, 350-351.

<sup>f</sup>For. Rel. 1894, App. I. 243, 247.

<sup>g</sup>For. Rel. 1894, App. I. 245-246.

Mosquito chief invoked the interposition of the British consul, Mr. Bingham, who on February 27 demanded of Señor Lacayo the restoration of the status quo under the treaty of Managua and the award of the Emperor of Austria, at the same time referring to the presence of a British man-of-war.<sup>a</sup> The state of siege was raised, and the Mosquito flag hoisted alongside of that of Nicaragua; and on March 3, 1894, Señor Lacayo entered with Captain Howe, of H. B. M. S. *Cleopatra*, and Mr. Bingham, into a "provisional treaty" for the government of the Reservation. Under this arrangement Señor Lacayo agreed (1) to organize a force for the protection of Bluefields, (2) to organize a municipal council of five persons, three to be appointed by himself and two by the American consul, (3) to withdraw the military forces from the Reservation, and (4) to respect the treaties between Great Britain and Nicaragua. The council was appointed, Señor Lacayo himself becoming president of it, and Mr. Seat appointing the two American members. The Nicaraguan troops were embarked on the *Cleopatra* for San Juan del Norte, and at the joint request of Señor Lacayo and Mr. Hatch, the British acting consul or proconsul, a force of British marines was landed to assure order.<sup>b</sup> The provisional government was, however, objected to by the American residents, who desired to preserve the local autonomy, and to that end sought to obtain a larger representation of the people in the municipal council; and in order to present their views to their Government they sent to Washington a delegation, of which Mr. Seat, the consular agent, was a member.<sup>c</sup> March 19, 1894, Señor Lacayo concluded with the British consul an agreement, or protocol, for a provisional government, under a municipal council of seven members, of whom two were to be appointed by the Nicaraguan commissioner, two by the American consul, one by the Indians, and one by the Creoles, the commissioner himself being president.<sup>d</sup> This protocol was approved by Señor Madriz, who soon afterwards arrived as a special commissioner from Nicaragua, and who, on March 28, 1894, proclaimed it. The British marines were reembarked on the 20th of March, receiving the thanks of the Nicaraguan commissioner and the American residents.<sup>e</sup>

When news was received at Washington of the landing of British marines at Bluefields, instructions were cabled to the minister of the United States in Nicaragua to report whether they were landed "under asserted right of sovereignty or only for protection;" and to

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<sup>a</sup>For. Rel. 1894, App. I. 237-239.

<sup>b</sup>For. Rel. 1894, App. I. 239-241.

<sup>c</sup>For. Rel. 1894, App. I. 252-254, 255, 256-258. As to the framework of the previous Mosquito government, see id. 276-279; and, as to land titles in the reserve, id. 284-286.

<sup>d</sup>For. Rel. 1894, App. I. 270.

<sup>e</sup>For. Rel. 1894, App. I. 265, 269, 270, 272.

the ambassador of the United States at London to ascertain the occasion for their landing.<sup>a</sup>

“Just had an audience with Lord Kimberley, who is without precise knowledge or reliable information of occurrences at Bluefields. British Government have given no instructions and are awaiting information which, when received, will be promptly and fully communicated to the United States. British consul at Greytown telegraphed, 4th of March, British minister at Guatemala, that Nicaraguans suddenly seized Bluefields and displaced Mosquito flag, behaving violently and cruelly. Because of disorders and dangers to residents, British war vessels visited Bluefields. Mosquito flag rehoisted, quiet restored, pending settlement. Extract from Lord Salisbury’s note of March, 1889, in Foreign Relations for that year, page 469, has full concurrence of Lord Kimberley, ‘No protectorate in substance or form, nor anything in nature of protectorate, desired or intended by British Government.’ Read in this connection instructions, Bayard to Phelps, No. 530, November, 1888. I believe landing of forces was to extend safety to residents and check violence.”

Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, tel., March 15, 1894, For. Rel. 1894, App. I, 250. See, also, id. 251.

“It appears to be conclusively established that the British naval and consular agents in Nicaragua have joined with the Nicaraguan commissioners in various arrangements for the administration of local government in the Mosquito Indian Reservation. The first of these agreements, reached in conferences held on February 26 and 27, between the Nicaraguan commissioner for the reservation, Señor Lacayo; the British consul at San Juan del Norte, Mr. Bingham, and Captain Howe, of H.M.S. *Cleopatra*, appears not to have been completed and announced until March 4, after the *Cleopatra* had visited Colon for the purpose of receiving instructions from London. It would seem that Her Majesty’s Government had cognizance of the proposed arrangement. The provisional agreement of March 4 proving abortive, it gave place to another understanding reached on March 19, between the same parties, which does not appear to have been announced until approved, on March 25, by the newly arrived special commissioner of Nicaragua, Señor José Madriz, the Nicaraguan minister for foreign affairs, by whom it was incorporated and proclaimed in a decree, dated March 28, purporting to establish a provisional government for the Mosquito Indian Reservation.

“These several arrangements in terms rest upon what are called ‘contracts’ and ‘protocols’ between the representatives of Great Britain and Nicaragua. By Señor Madriz’s decree of March 28, these arrangements are to last ‘until the high contracting signatories, parties to the treaty of Managua, dated 1860, arrange the needful regarding the reserved territory.’

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<sup>a</sup>For. Rel. 1894, App. I. 250.

"I am unable to see that this joint assumption of authority by British and Nicaraguan agents is compatible with the stipulations of the treaty of Managua. By that treaty Great Britain renounced all sovereignty over the reservation and recognized the sovereignty of Nicaragua over the same, and Nicaragua agreed that the Indians should enjoy 'the right of governing according to their own customs, and according to any regulations which may from time to time be adopted by them not inconsistent with the sovereign rights of the Republic of Nicaragua, themselves, and all persons residing within such district,' subject only to the future contingency of their agreeing 'to absolute incorporation into the Republic of Nicaragua on the same footing as other citizens of the Republic, and . . . subjecting themselves to be governed by the general laws and regulations of the Republic, instead of by their customs and regulations.'

"The stipulations exclude all idea of local government by others than the Indians in the reservation. They allow no room for foreign intervention in the government of the reservation, or for the administration of the affairs therein by resident aliens.

"That the provisional plan formulated by the representatives of Nicaragua and Great Britain provides for the appointment of American, Indian, and Creole representatives on the proposed governing commission in nowise alters the essential character of the transaction. The arrangement itself rests upon no sound basis of existing right. Its tendency can only be toward fortifying the assumption that 'Mosquitia' is a territorial entity with sovereign rights.

"The agents of the United States in Nicaragua have had no part in framing the reported provisional arrangement, and they have signified their intention not to participate in its administration. The proceeding has not, and can not have, the sanction of this Government, directly or indirectly.

"I am pleased to see by Captain Watson's report that the landing of British forces in the territory was simply for the protection of life and property—American and native as well as English—and that it has not lasted longer than was warranted by events. . . .

"With the foregoing views and the inclosed papers before you, you are in a position to express to Lord Kimberley the President's hope and expectation that the anomalous situation now disclosed may speedily cease and that no foreign agency shall be permitted to dictate or participate in the administration of affairs in the Mosquito Reservation."

Mr. Gresham, Sec. of State, to Mr. Bayard, amb. to England, No. 374, April 30, 1894, *For. Rel.* 1894, App. I, 271.

In an instruction to Mr. Baker, min. to Nicaragua, May 12, 1894, id. 290.

Mr. Gresham said: "You should take care to say nothing tending to disparage Nicaragua's rightful claim to paramount sovereignty or to encourage pretensions to autonomous rights inconsistent therewith."

See, also, Mr. Gresham to Mr. Baker, June 13, 1894, id. 296; also, 302.

“Had an interview with Lord Kimberley to-day, who stated no intention or desire of Great Britain to exercise protectorate in any form over any portion of Nicaraguan territory, but to act thoroughly in concert with the United States for maintaining safety of the citizens and property of both countries, continuing our treaty of 1850 in unbroken force and effect. British consul acted without instructions in making provisional agreement in March, under apprehended danger to life and property. British Government anxious for consultation with the Government of the United States to guard against apprehended Nicaraguan violence to American and British interests. British ambassador at Washington instructed to that effect.”

Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, tel., May 22, 1894, For. Rel. 1894, App. I. 290. See, also, full dispatch of Mr. Bayard, id. 291-293.

July 5 and 6, 1894, a disorder, originating in a dispute of policemen, chiefly Jamaicans, with the provisional government as to overdue pay, developed into an uprising, in which that government was overthrown. A proclamation, signed by the Mosquito chief, Clarence, who during the troubles in February had retired to Pearl Lagoon, was published, declaring that he had resumed his functions and calling upon the people to recognize his authority. The Nicaraguans, however, declared their purpose to reestablish their authority; and Gen. Cabezas, who remained at Bluefields as Nicaraguan commissioner, declared a state of siege, and announced that all who had participated in the uprising would be tried as rebels by a military court.<sup>a</sup> Señor Madriz was sent back to the Reservation with a military force, and the Nicaraguan authority was reestablished.<sup>b</sup> It was charged that the revolution, which Mr. Seat declared to have been an “impromptu uprising of the natives and Jamaica negroes,” was participated in by Americans; but the charge was disproved except as to two or three persons of comparative unimportance.<sup>c</sup> The occurrence, however, added to the complications of the situation, which was further greatly embarrassed, especially as between Nicaragua and Great Britain, by the sudden seizure and expulsion by the Nicaraguan authorities of two American citizens and twelve British subjects, among the latter being Mr. Hatch, the British proconsul.<sup>d</sup>

“My instruction to you of April 30, No. 374, will have shown that the late attempts to organize, through alien intervention, a government for the Mosquito Reservation wholly foreign to the scheme provided by the treaty of Managua were deemed by us to be at variance with the policy and engagements of half a century. Acceptance of

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<sup>a</sup> For. Rel. 1894, App. I. 303-305, 313, 317, 319, 321, 326.

<sup>b</sup> For. Rel. 1894, App. I. 344-346.

<sup>c</sup> For. Rel. 1894, App. I. 307, 309-310, 313, 320, 324, 325, 326.

<sup>d</sup> For. Rel. 1894, App. I. 332, 336-337, 338, 343, 348, 350, 352, 355.

the implied invitation of Lord Kimberley for the United States to join with Great Britain in devising a solution of the problems growing out of the Bluefields incident might imply a willingness on the part of this Administration to depart from the consistent policy pursued by previous Administrations in dealing with Central American questions.

"The situation at Bluefields, and elsewhere in the strip, presents no question difficult of solution. The sovereignty of Nicaragua over the whole of the national domain is unquestionable. She has granted or secured to certain Indians within part of her domain the right of self-government, under expressed conditions and limitations. It may be safely said that such government does not exist, and has not existed in the Mosquito territory. An alien administration, in other interests than those of the Indians, notoriously exists, especially at Bluefields. Nobody is deceived by calling this authority a Mosquito Indian government. No matter how conspicuous the American or other alien interests which have grown up under the fiction of Indian self-government, neither the United States nor Great Britain can fairly sanction or uphold this colorable abuse of the sovereignty of Nicaragua.

"So far as American rights of person and property in the reservation are concerned, this Government can not distinguish them from like rights in any other part of Nicaragua, and should they be invaded we could only look to the territorial sovereign for redress. This being so, the United States could neither participate in nor sanction any device whereby the ultimate authority and international responsibility of Nicaragua in respect of American citizens in the reservation might be impaired or restricted.

"These general considerations are submitted for your guidance in dealing with any suggestions Lord Kimberley may advance."

Mr. Gresham, Sec. of State, to Mr. Bayard, amb. to England, July 19, 1894,  
For. Rel. 1894, App. I. 311, 312.

"To-day, in a personal interview at the foreign office with Lord Kimberley, his lordship, referring to the presence of the two armed ships of the United States and Great Britain at Bluefields, said there would be no difficulty in their keeping order, and he deprecated very positively the use of the name of the Mosquito Indians as a shield under which foreign residents sought to wage war in opposition to Nicaragua, and said that the presence of the British vessel and armed forces had no other object or purpose than to protect the lives and property of British residents during a period of lawlessness and strife, and that the only desire of his Government beyond that was to induce the Nicaraguans to treat the Indians with forbearance and moderation, and not shoot them down, as they were very apt to do.

"I took the opportunity to repeat what I had stated to his lordship on a former occasion—that the United States were wholly opposed to the employment of the fiction of a Mosquito government to organize

an opposition to the Government of Nicaragua, which had no connection whatever with the customs and domestic usages of the Mosquito Indians, and that American citizens would not be allowed to set up any such government under any pretext."

Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, Aug. 10, 1894, For. Rel. 1894, App. I. 322.

See, also, Mr. Gresham, Sec. of State, to Mr. Bayard, amb. to England, Aug. 22, 1894, id. 328.

"I have the honor to state that yesterday, by appointment, I called on Lord Kimberley at the foreign office, and the subject of the interview was the present condition of affairs between Great Britain and Nicaragua, arising out of the rough treatment of Mr. Hatch, a representative of the former Government at Bluefields, at the hands of Nicaraguan authorities.

"His lordship stated the occurrences complained of dated some three months ago, and, although explanation had at once been demanded, no response was made until two days ago, when a very voluminous reply in Spanish (necessitating translation) had been sent in, but which he had not yet had time to consider.

"For the purpose of sending this dispatch by the mail to-day, it is enough to say that his lordship desires explicitly to have it understood that any action in the way of obtaining redress from Nicaragua which Her Majesty's Government may hereafter decide is necessary in the premises is wholly unconnected with any political or conventional question touching the Mosquito Reservation, but is simply a proceeding, on the grounds of international law, to obtain satisfaction for an affront.

"His lordship repeated to me, with much emphasis, his desire that this should be understood, and that he had no other wish than to act in accord and with the approval of the United States in matters concerning political control in Central America.

"I reminded his lordship of the very imperfect civilization of the region where these difficulties had arisen, and of the incidental departures from the regulated proprieties of official life and legal methods which were naturally to be looked for in that quarter.

"I told him in general substance the views I had expressed to Señor Barrios here in October last, and lately in Washington to Señor Guzman, in relation to the entire facility and finality with which the Government of Nicaragua could pacify the entire region and absorb the small remnant of Indian self-government in Mosquito by simply dealing with generosity and gentle pressure with the leading Indians, and procure that 'formal incorporation' of the territory of the Mosquito Reservation and the rest of Nicaragua provided for in the treaty of Managua, and thus the entire question of jurisdiction and of British or other interference could be ended.

"Lord Kimberley warmly seconded this view, and expressed a desire it should be carried out."

Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, Nov. 24, 1894, For. Rel. 1894, App. I, 354.

"Minister from Nicaragua is advised by his Government that British minister to Nicaragua declares England does not accept Nicaraguan rule in Mosquito territory, and that British minister has telegraphed to Limon for English war vessel to go to Bluefields. While this information is not fully credited here, you will inquire and report."

Mr. Gresham, Sec. of State, to Mr. Bayard, amb. to England, tel., Nov. 24, 1894, For. Rel. 1894, App. I, 356.

"Lord Kimberley, having my note of the 26th lying before him, stated that my report to you of the interview of Friday previous, as recited in my note of that day to him, was entirely accurate, but that he had not then informed me of his latest telegraphic instructions to the British minister at Nicaragua respecting a number of decrees which had been lately promulgated at Bluefields by the Nicaraguan commissioner, and which, pending the consideration of the incident of the arrest and expulsion of the British proconsul and the proposed discussion here by Señor Barrios, were not accepted by the British Government, but that a notification of a cautious nature—'a caveat' (as his lordship termed it)—had been filed by the British minister, in order that the assent and approval by Great Britain of these decrees, so far as they affected British interests in Nicaragua and British duty under the treaty of Managua and the Austrian award thereunder, should not be considered as conclusively given, but to remain suspended until the mission of Señor Barrios and the incident of Hatch's arrest should have reached a satisfactory termination."

Mr. Bayard, amb. to England, to Mr. Gresham, Sec. of State, Nov. 27, 1894, For. Rel. 1894, App. I, 356. The note of Nov. 26, was as follows:

"DEAR LORD KIMBERLEY: After the interview which I had the honor to hold with your lordship on last Friday afternoon I wrote to my Government a full statement of what you then told me you had in possible contemplation in relation to Nicaragua, after you should have considered the reply of that Government (then undergoing translation from the Spanish) to your demand for explanation of the incident of the arrest and forcible expulsion by the Nicaraguan authorities of Mr. Hatch, the locum tenens of the British consul at Bluefields, in August last.

"I reported very fully your statement of the attitude of Great Britain toward Nicaragua and your desire to have it explicitly understood by the United States that any measures Her Majesty's Government might feel obliged to adopt, by reason of the alleged ill treatment of Proconsul Hatch, or of other British subjects, at Bluefields, would be wholly apart and unconnected with the 'Mosquito' question or the jurisdiction of Nicaragua over the inhabitants of the territory included in the region that bears that name; and that you proposed to proceed, solely upon



grounds of international duty and self-respect, to procure such redress for an alleged wrong to your citizens as might be found just and necessary, and that no jurisdictional or other question would be involved.

"Late on Saturday night, and after my dispatch had gone, I received a telegram from Secretary Gresham to the effect that the Nicaraguan minister at Washington stated that he had been informed by his Government that the British minister to Nicaragua had announced that his Government does not accept Nicaraguan rule in the Mosquito territory, and that he had sent for a British man-of-war.

"The Secretary is not disposed to credit these statements, and merely asks for information; but before answering his telegram, I wanted to keep you advised of all the facts and, if you think I should be further informed than I was by you in our interview of Friday, you will kindly let me know, and I will at once come and see you."

Mr. Bayard's dispatch of Nov. 24 was acknowledged by Mr. Gresham, Dec. 3, 1894, as a gratifying confirmation of communications made by the British embassy. (For. Rel. 1894, App. I. 358.)

See a reference to the Bluefield's incident in President Cleveland's annual message, Dec. 3, 1894.

"I have the honor to transmit to your excellency a copy of the resolution passed November 20, last, by the Mosquitia convention, composed of delegates from all the native tribes of the region called the Reserve, and which from the present date will be known by the name of 'Department Zelaya.'

"As your excellency will observe, the convention resolved, freely and spontaneously, the absolute incorporation of that territory in the Republic of Nicaragua, recognizing the constitution of that Republic in a decisive and formal manner, in doing which they did no more than carry out the provisions of article 4 of the treaty of January, 1860, between Nicaragua and Great Britain, generally known under the name of the 'treaty of Managua,' in which it was provided, as was proper, that nothing should prevent, at any future time, the Mosquito Indians from carrying out the aforesaid incorporation and becoming subject to the laws and general regulations of the Republic, in place of being governed by their own customs and laws.

"This decision of the Mosquito delegates puts an end to the difficulties which existed in that portion of the Nicaraguan territory, and at the same time renders impossible, in future, any attempt to ignore the recognition of the absolute sovereignty of Nicaragua over the region formerly called 'Mosquitia,' seeing that, in view of the resolutions of the natives themselves, no pretext at all can be found for such a procedure.

"I take pleasure in assuring your excellency that Nicaragua highly appreciates the kind and opportune action of the Government of the United States during the difficulties to which I have referred, and that she recognizes how powerfully that action has contributed to the happy and final settlement of the question.

"On my own part, I desire to render to your excellency personally my most sincere thanks for the friendly interest which you have

always been pleased to show me in the said matter, thus contributing in an efficient manner to bring the affair to a satisfactory conclusion."

Mr. Guzman, Nic. min., to Mr. Gresham, Sec. of State, Dec. 28, 1894, For. Rel. 1894, App. I. 360.

The "resolution" of the Mosquito convention, enclosed by Dr. Guzman, was as follows:

- "Whereas the change which took place on the 12th of February of the present year was due to the efforts of the Nicaraguan authorities to endeavor to free us from the slavery in which we were;
- "Whereas we have agreed wholly to submit to the laws and authorities of Nicaragua for the purpose of forming part of their political and administrative organization;
- "Whereas the lack of a respectable and legitimate government is always the cause of calamity to a people, in which condition we have been for so long a time;
- "Whereas one of the reasons of the backward condition in which we live doubtless was the improper use of the revenues of the Mosquito territory, which were employed for purposes which had nothing to do with good administrative order;
- "Whereas although the constitution of Nicaragua provides for all the necessities and aspirations of a free people, we, nevertheless, desire to retain special privileges in accord with our customs and our racial disposition.
- "In virtue of all the foregoing, in the exercise of a natural right, and of our own free will, we hereby declare and

"DECREE.

- "ART. 1. The constitution of Nicaragua and its laws shall be obeyed by the Mosquito people who shall be under the protection of the flag of the Republic.
- "ART. 2. All revenues that may be produced by the Mosquito shore district shall be invested for the benefit of that district, and we reserve our own financial autonomy; but the said revenues shall be collected and administered by the officers of the treasury of the supreme Government.
- "ART. 3. Natives shall be exempt from all military service in time of peace and war.
- "ART. 4. No tax shall be levied upon the persons of Mosquitos.
- "ART. 5. The right of suffrage shall be enjoyed by both males and females who are more than eighteen years old.
- "ART. 6. The native communities shall be under the immediate control of the inspecting chief and of the alcaldes and police officers in their respective localities.
- "ART. 7. None but Mosquito Indians shall be elected to fill the said offices.
- "ART. 8. Alcaldes and police officers shall hold their positions so long as they shall enjoy the confidence of the people, but they may be removed by order of the intendant or by popular motion.
- "ART. 9. When the alcaldes and police officers enter upon the duties of their offices, the chief inspector shall administer the oath of office to them, for which purpose he shall make use of the following form: 'Do you swear by God and the Bible to exert yourself in behalf of the happiness of the people that have elected you, and to obey and execute the laws of Nicaragua?' The person to whom this question is addressed shall reply, 'Yes, I swear.'

"ART. 10. The people shall promulgate their local regulations in assemblies over which the chief shall preside, and such regulations shall be submitted for approval to the superior authority of the national Government on the coast.

"ART. 11. In token of gratitude to General I. Santos Zelaya, the President of the Republic, to whose efforts we owe (enjoy) the privilege of enjoying our liberty, the district which has heretofore been known as the Mosquito Reservation shall henceforth be called the Department of Zelaya.

"Done in the hall of sessions of the Mosquito convention this 20th day of November, one thousand eight hundred and ninety-four.

"The signatures of the delegates follow with this authentication: 'The undersigned hereby certify that they were present at the session of the Mosquito assembly in which the foregoing decree was adopted, which decree was promulgated by the unanimous consent of the representatives above named, who, being unable to write, have accepted our certificate. B. B. Seat, U. S. consular agent; J. Wienberger, alcalde of the city of Bluefields; Sam. Weill, mayor; A. Aubert, treasurer-general.'

"R. CABEZAS,

"*Intendant-General of the Atlantic Coast of Nicaragua.*

"Before me.

"JOSÉ MARIA MONGRIO,

"*Secretary of the Intendant's Office.*"

By a circular telegram addressed by the President of Nicaragua to the Presidents of the other Central American Republics, in May, 1899, it was announced that the Mosquito Indians had renounced the special rights reserved to them by the foregoing "resolution," or convention. (Mr. Hay, Sec. of State, to Mt. Merry, min. to Nicaragua, June 3, 1899, MS. Inst. Cent. Am. XXI. 492, acknowledging receipt of Mr. Merry's No. 263, of May 18, 1899.)

The Indians of the Riti-pura hamlet sent a petition to the American consul at San Juan del Norte, protesting against the "Act of Reincorporation," and the abrogation of the convention of 1894. (Mr. Hay, Sec. of State, to Mr. Merry, min. to Nicaragua, No. 252, July 3, 1899, MS. Inst. Cent. Am. XXI. 507, enclosing copies of two dispatches from the consul at San Juan del Norte, Nos. 256 and 257, June 27, 1899.)

In a note to Mr. Guzman, Dec. 31, 1894, acknowledging the receipt of his note of the 28th and the accompanying copy of the act of incorporation, Mr. Gresham said: "Having already, upon information received from the United States minister at Managua and our naval commander at Bluefields, as well as from yourself, orally expressed my satisfaction at this outcome of a situation which for nearly a year has demanded careful consideration, I take this opportunity to state the gratification it affords this Government to see the voluntary and orderly accomplishment of this important step by the native Mosquito Indians themselves."<sup>a</sup>

The National Legislative Assembly of Nicaragua, Feb. 27, 1895, approved the resolution of the Mosquito convention.<sup>b</sup>

Mr. Bayard, in a dispatch of Dec. 22, 1894, stated that "there was the most open expression of satisfaction at the foreign office upon the

<sup>a</sup>For. Rel. 1894, App. I. 363.

<sup>b</sup>For. Rel. 1895, II. 1034.

reported voluntary incorporation of the Indians with the rest of Nicaragua"; and denied, on the written authority of Lord Kimberley, a rumor that the Mosquito chief, who was in Jamaica, had been informed that the British authorities would not recognize the new order and had been notified to hold himself in readiness to return to Bluefields.<sup>a</sup>

"In last year's message I narrated at some length the jurisdictional questions then freshly arisen in the Mosquito Indian strip of Nicaragua. Since that time, by the voluntary act of the Mosquito Nation, the territory reserved to them has been incorporated with Nicaragua, the Indians formally subjecting themselves to be governed by the general laws and regulations of the Republic instead of by their own customs and regulations, and thus availing themselves of a privilege secured to them by the treaty between Nicaragua and Great Britain of January 28, 1860."

President Cleveland, annual message, Dec. 2, 1895, *For. Rel.* 1895, p. *xxxi*.

The British Government appears, however, to have reserved its opinion as to the effect of what had been done. In a note to Dr. Barrios, Nicaraguan envoy at London, of Feb. 26, 1895, in relation to the arrest and expulsion of British subjects, Lord Kimberley stated that Her Majesty's Government, until that matter had been disposed of, were not prepared "to discuss any questions with regard to the treaty of Managua and the recent proceedings in the Mosquito Reserve"; but that, so soon as the demands in relation to the former matter had been satisfied, he should "be prepared to receive and consider in a friendly spirit any representations on those questions which the Nicaraguan Government may desire to make to Her Majesty's Government."<sup>b</sup>

By a convention signed at London November 1, 1895, it was agreed to constitute a mixed commission "to fix the amount due to British subjects in respect of injury caused to them or their property or goods in the Mosquito Reserve, owing to the action of the Nicaraguan authorities in the course of the year 1894." It was provided that the commission should be composed of a British representative, who must be well acquainted with the Spanish language; a Nicaraguan representative, who must be well acquainted with English; and "a jurist, not a citizen of any American State." Should the two governments be unable to agree on this jurist he was to be named by the President of the Swiss Confederation. The commissioners were to sit in Bluefields, and to decide the claims before them "in accordance with the principles of international law, and the practice and jurisprudence established by such analogous modern commissions as enjoy the best reputation." By a protocol annexed to the convention, it was provided: "Her Majesty's Government will not support the claim of any

<sup>a</sup> *For. Rel.* 1894, App. I, 359-360.

<sup>b</sup> *For. Rel.* 1895, II. 1028.

person before the commission unless they consider him to be a British subject; and, on their part, the Nicaraguan Government will accept such status as duly established, subject to the production by them of proof that the claimant is not entitled to it in contemplation of English law."

For. Rel. 1896, 307-310.

Early in 1900 it was understood that the British Government was about to submit to that of Nicaragua a proposal to conclude, in connection with the negotiations for a commercial treaty, a convention recognizing the sovereign rights of Nicaragua over all the Atlantic coast of the Republic and providing for the enjoyment by the Mosquito Indians of certain privileges previously enjoyed by them in matters of taxation and military service. (Mr. Hay, Sec. of State, to Mr. Merry, min, to Nicaragua, Jan. 29, 1900, MS. Inst. Cent. Am. XXI. 619.)

As to the insurrection at Bluefields in February 1899, and the question of the payment of customs dues, see *supra*, § 21, vol. 1, p. 49 et seq.

#### IV. AMERICAN ROUTES AND GRANTS.

##### § 368.

For information concerning old and new interoceanic canal routes, projects and companies, in America, see Keasbey's Nicaragua Canal and the Monroe Doctrine, at the various pages indicated in the index. Much will also be found there in relation to railway projects.

The Government of New Granada granted to the Panama Railroad Company the exclusive right to construct a railroad across the Isthmus of Panama. The Attorney General of the United States expressed the opinion that this exclusive right was not violated by a grant made by New Granada to the Chiriqui Company to construct a railroad across the Isthmus of Chiriqui. He added, however, that the question was geographical rather than legal, and that any other person was as good a judge of it as himself.

The position taken by the Government of the United States in the matter was that the United States felt a deep interest in all ways of communication between the Atlantic and Pacific, and that if a railroad could be authorized and made across the Isthmus of Chiriqui without interference with existing rights or violation of the good faith of New Granada, it would be of great value to commerce, and of especial value to the United States, so that the President would be glad to render it any proper assistance within his reach. The President also desired that the Panama Railroad Company should "obtain all suitable facilities from New Granada for the prosecution and extension of its great and increasing traffic. In any conflict of interest between the two companies it is not our duty to interfere. We wish them both success, and, in the opinion of the Attorney General, there is good reason to believe that this success may be accomplished without any material conflict between them."

Mr. Cass, Sec. of State, to Mr. Jones, min. to Colombia, May 4, 1860, MS. Inst. Colombia, XV. 303; Black, At.-Gen., Sept. 19, 1859, 9 Op. 391.

In his instructions to Mr. Jones, Mr. Cass refers to an unofficial letter given by him, January 17, 1860, to Mr. Henry S. Sanford, with a view to obtain facilities, as the representative of the Panama Railroad Company, for the adjustment of matters in controversy between that company and the New Granada Government. In this relation Mr. Cass particularly referred to questions as to tonnage taxes and taxes on mail matter.

In a report to his Government, June 24, 1881, Mr. Pereira, secretary of the Colombian legation at Paris, referring to the circumstance that he had found M. de Lesseps engaged on a certain occasion in conversation "with the North American general, Mr. Henry Shelton Sanford," speaks of the latter as "the same who went to Bogotá in the years 1860 and 1861, with the double charge of representing there the North American Government and the Panama Railroad Company." (For. Rel. 1881, 359.)

In 1864 the minister of the United States at Bogotá was instructed to use his good offices to secure from the Government of Colombia an extension of the franchises of the Panama Railroad Company. (Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Aug. 17, 1864, MS. Inst. Colombia, XVI. 99.)

"The suit of Colombia against the Panama Railroad Co. for the possession of Manzanillo Island has been decided by the Supreme Court of Colombia in a manner entirely favorable to the company." (Mr. Wharton, Act. Sec. of State, to Messrs. Barlow, Larocque & Choate, May 11, 1891, 181 MS. Dom. Let. 663. See, also, *supra*, § 344.)

"The Mexican Government having on the 5th of February, 1853, authorized the early construction of a plank and rail road across the Isthmus of Tehuantepec, and, to secure the stable benefits of said transit way to the persons and merchandize of the citizens of Mexico and the United States, it is stipulated that neither Government will interpose any obstacle to the transit of persons and merchandize of both nations; and at no time shall higher charges be made on the transit of persons and property of citizens of the United States than may be made on the persons and property of other foreign nations, nor shall any interest in said transit way, nor in the proceeds thereof, be transferred to any foreign government.

"The United States, by its agents, shall have the right to transport across the isthmus, in closed bags, the mails of the United States not intended for distribution along the line of communication; also the effects of the United States Government and its citizens, which may be intended for transit, and not for distribution on the isthmus, free of custom-house or other charges by the Mexican Government. Neither passports nor letters of security will be required of persons crossing the isthmus and not remaining in the country.

"When the construction of the railroad shall be completed, the Mexican Government agrees to open a port of entry in addition to the port of Vera Cruz, at or near the terminus of said road on the Gulf of Mexico.

"The two Governments will enter into arrangements for the prompt transit of troops and munitions of the United States, which that Government may have occasion to send from one part of its territory to another, lying on opposite sides of the continent.

"The Mexican Government having agreed to protect with its whole power the prosecution, preservation, and security of the work, the United States may extend its protection as it shall judge wise to it when it may feel sanctioned and warranted by the public or international law."

Art. VIII., treaty between the United States and Mexico, Dec. 30, 1853, commonly called the Gadsden treaty.

As to the Louisiana Tehuantepec Company, see Mr. Seward, Sec. of State, to Mr. Marshall O. Roberts, Dec. 7, 1866, 74 MS. Dom. Let. 484.

See, also, same to same, Dec. 13, 1866, *id.* 522, enclosing copy of the charter of the "Tehuantepec Transit Company."

As to the claim of the Tehuantepec Ship-Canal and Mexican and Pacific R. R. Co. against Mexico, see Moore, *Int. Arbitrations*, III. 3132.

In October, 1870, the minister of the United States at Mexico was instructed to propose that the stipulations of the foregoing article be revived in behalf of the Tehuantepec Railway Company, and also enlarged so as to be applicable to a ship canal, for the construction of which the company contemplated applying for a concession. (Mr. Fish, Sec. of State, to Mr. Nelson, *min. to Mexico*, Oct. 22, 1870, MS. *Inst. Mexico*, XVIII. 189.)

As to joint American and Mexican surveys, see *For. Rel.* 1871, 630.

"The views of the President with respect to the transit routes across the Isthmus were sufficiently explained in your instructions of 2d January last, and need not be repeated now. While, however, our policy concerning them is of the most liberal character, and contemplates their free enjoyment by all the nations of the world, there are obvious reasons why we should prefer to have them under the control and management of American companies, and the United States could not look with indifference upon any attempt to change this result at the sacrifice of the rights of our own citizens. Should such an attempt be made by the Government of Nicaragua, with respect to the transit through that country, it will then be for this Government to determine what measures are required of it for the just protection of its citizens in the enjoyment of their rights. In your intercourse with the Nicaraguan authorities you will bear in mind these considerations, and while you will not undertake to commit your government to the absolute enforcement of any contract, you will take care to point out to the Nicaraguan Government the dangerous consequences which may ensue should its plighted faith be disregarded on a subject so important as the route from the Atlantic to the Pacific, by the river San Juan."

Mr. Cass, Sec. of State, to Mr. Lamar, *min. to Cent. Am.*, June 3, 1858, MS. *Inst. Am. States*, XV. 312.

This instruction is referred to in Mr. Cass, Sec. of State, to Mr. Body, Sec. Am. Atlantic and Pacific Ship Canal Co., March 3, 1860, 52 MS. Dom. Let. 11.

In a later letter to Mr. Body, March 22, 1860, acknowledging receipt of a translation of a new contract between the Nicaraguan Government and his company, Mr. Cass, in reply to a request for comments on the contract, said: "Although this government takes a proper interest in measures which may tend to secure or facilitate the transit across Nicaragua, any parties who may enter into a contract for that purpose, must do so upon their own responsibility and cannot expect an opinion from this Department upon the subject in advance of any occasion on which the Department might deem itself warranted in acting." (52 MS. Dom. Let. 64.)

As to the conflicting claims of the Central American Transit Company and the New Jersey and Pacific Transportation and Nicaraguan Railroad Company, see Mr. Seward, Sec. of State, to Mr. Morris, April 28, 1868, 78 MS. Dom. Let. 396.

"In reply the undersigned feels called on simply to reiterate the doctrine which has been made public in the dispatch which he addressed to General Lamar, on the 25th July, 1858, on the subject, and which is embraced substantially in the following sentences:

" 'Nor do they [the United States] claim to interfere with the local Governments in the determination of the questions connected with the opening of the routes and with the persons with whom contracts may be made for that purpose. What they do desire and mean to accomplish is that the great interests involved in this subject should not be sacrificed to any unworthy motive, but should be guarded from abuse, and that, when fair contracts are fairly entered into with American citizens, they should not be wantonly violated.' And again: 'There are several American citizens who, with different interests, claim to have formed engagements with the proper authorities of Nicaragua for opening and using the transit routes, with various stipulations defining their privileges and duties, and some of these contracts have already been in operation. This Government has neither the authority nor the disposition to determine the conflicting interests of these claimants. But what it has the right to do, and what it is disposed to do, is to require that the Government of Nicaragua should act in good faith towards them, and should not arbitrarily and wrongfully divest them of rights justly acquired and solemnly guaranteed.'

"Where one of the parties to a contract proceeds by an arbitrary act to annul it, on the ground that the other party has failed to comply with its conditions, and by a process which precludes any investigation, the plainest principles of justice are violated. What the United States require is not that their citizens should be maintained in rights they have forfeited, but that they should not be deprived of



rights derived from the Government of Nicaragua without a fair examination by an impartial tribunal."

Mr. Cass, Sec. of State, to Mr. Jerez, May 5, 1859, MS. Notes to Cent. Am. I. 154.

"The contract of the Maritime Canal Company of Nicaragua was declared forfeited by the Nicaraguan Government on the 10th of October, on the ground of nonfulfillment within the ten years' term stipulated in the contract. The Maritime Canal Company has lodged a protest against this action, alleging rights in the premises which appear worthy of consideration. This Government expects that Nicaragua will afford the protestants a full and fair hearing upon the merits of the case."

President McKinley, annual message, Dec. 5, 1899. (For. Rel. 1899, p. xvii.)

"The all-important matter of an interoceanic canal has assumed a new phase. Adhering to its refusal to reopen the question of the forfeiture of the contract of the Maritime Canal Company, which was terminated for alleged nonexecution in October, 1899, the Government of Nicaragua has since supplemented that action by declaring the so-styled Eyre-Cragin option void for nonpayment of the stipulated advance. Protests in relation to these acts have been filed in the State Department and are under consideration. Deeming itself relieved from existing engagements, the Nicaraguan Government shows a disposition to deal freely with the canal question either in the way of negotiations with the United States or by taking measures to promote the waterway.

"Overtures for a convention to effect the building of a canal under the auspices of the United States are under consideration. In the meantime, the views of the Congress upon the general subject, in the light of the report of the Commission appointed to examine the comparative merits of the various trans-Isthmian ship-canal projects may be awaited."

President McKinley, annual message, Dec. 3, 1900. (For. Rel. 1900, p. xxv.)

As to the incorporation of the Maritime Canal Company of Nicaragua by the United States, see H. Report 211, 46 Cong. 3 sess.; S. Report 368, 47 Cong. 1 sess.; H. Report 1698, 47 Cong. 1 sess., parts 1 and 2; S. Report 952, 47 Cong. 2 sess.; S. Report 1628, 49 Cong. 2 sess.; S. Report 221, 50 Cong. 1 sess.

For the certificate of incorporation, see S. Doc. 400, 56 Cong. 1 sess.

For a list of stockholders and an account of work done, see S. Rep. 2234, 51 Cong. 2 sess.; S. Rep. 1262, 52 Cong. 2 sess.

"The Nicaraguan authorities having given notice of forfeiture of their concession to the canal company on grounds purely technical and not embraced in the contract, have receded from that position." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, p. xiii.)

For the renewed notice of proposed forfeiture, see For. Rel. 1897, 417-419.

Message of President Cleveland, transmitting the report of a board of engineers on the Nicaragua Canal, H. Doc. 279, 54 Cong. 1 sess., parts 1 and 2, vol. 89.

For the award of President Cleveland, March 22, 1888, on the boundary dispute between Costa Rica and Nicaragua, see Moore, *Int. Arbitrations*, II. 1945, 1964.

March 27, 1896, Costa Rica and Nicaragua concluded a treaty for carrying into effect the award of President Cleveland in their boundary dispute. The two Governments agreed each to name a commission, composed of two engineers or surveyors, and it was stipulated that whenever the two commissions should disagree, the disputed point or points should be submitted to the judgment of an engineer to be appointed by the President of the United States. (For. Rel. 1896, 100-102.)

The award of General Alexander, thus designated as engineer-umpire, is printed in For. Rel. 1897, 113-116. See, also, For. Rel. 1896, 100-102; For. Rel. 1897, 111, 330, 419-421.

Correspondence in relation to the boundary between Colombia and Costa Rica will be found in Foreign Relations 1893, 202, 216, 266, 270, 281, 286, 287, 289, 294. The discussion is continued in Foreign Relations 1894, 180, 192. It is also discussed in a report of the Colombian minister of foreign affairs, which was communicated to the Department of State by the American minister at Bogota, in October, 1894. (For. Rel. 1894, 193.)

June 14, 1897, Mr. Baker, United States minister to Nicaragua, enclosed a copy of a contract between that Government and the Atlas Steamship Company, a British corporation, for the exclusive navigation of the San Juan river and lake Nicaragua. Mr. Baker observed that while the contract assumed to protect the concession of the Maritime Canal Company, it made no provision for a future treaty with the United States. December 17, 1897, the minister of the United States at Nicaragua was instructed to examine the concession and report his views upon it, but to take no other action until he was further instructed. (For. Rel. 1897, 421, 425.)

"Pim, Forwood & Kellock, steamship agents of 17 State Street, who formerly handled the business of the Atlas Steamship Company, and at present have charge of the Atlas service of the Hamburg-American Line, deny the report that the Hamburg-American Packet Company, as successor of the Atlas Steamship Company, an English corporation, has the exclusive rights of steam navigation of the Silaco Lagoon, Nicaragua, for thirty years from Sept. 30, 1897, and the exclusive right for the same period of constructing tramways and railways along the line to avoid obstacles in the lower part of the San Juan River. They say that this concession was granted to the Nicaragua Mail Steamship Company and afterwards acquired by the Atlas Steamship Company. The exclusive rights and concessions, however, were not included in the purchase by the Hamburg-American Packet Company, but were disposed of to the Caribbean and Pacific Transit Company, another British corporation, which will have to be reckoned with before the canal can be built." (New York Times, Dec. 20, 1901.)

"The best authorized map of Nicaragua, according to Mr. Hall's No. 646, is attached to a work entitled 'Notas Geograficas y Economicas, sobre La Republica de Nicaragua. Por Pablo (Paul) Levy. Paris, 1873.' This work was subsidized and approved by the Nicaraguan Government

and may therefore be considered authoritative." (Mr. Bayard, Sec. of State, to Mr. Whitney, Sec. of Navy, June 3, 1887, 164 MS. Dom. Let. 310.)

As to the Panama and Nicaragua canal routes, see the following documents:

Report of Isthmian Canal Commission, Nov. 16, 1901, S. Doc. 54, 57 Cong. 1 sess., parts 1 and 2.

Report of the Isthmian Canal Commission, Jan. 18, 1902, advising acceptance of the proposition of sale of the New Panama Canal Co., S. Doc. 123, 57 Cong. 1 sess.

Mr. Morgan, S. Rep. 1, 57 Cong. 1 sess.

Mr. Morgan, S. Rep. 788, 57 Cong. 1 sess.

Messrs. Kittredge and Pritchard, S. Rep. 783, 57 Cong. 1 sess., part 2.

Mr. Morgan, May 26, 1902, S. Rep. 1663, 57 Cong. 1 sess., adverse to S. Bill 5676, leaving the choice of the route to the President.

Mr. Hepburn, H. Report 15, 57 Cong. 1 sess.

Hearings before the Interoceanic Canals Committee, S. Doc. 253, 57 Cong. 1 sess.

As to the New Panama Canal Company, see S. Doc. 188, 56 Cong. 1 sess.

For further discussions as to the interoceanic canal, see:

A reprint of the document of 1885 (comprising S. Ex. Docs. 112, 46 Cong. 2 sess.; 194, 47 Cong. 1 sess.; 26, 48 Cong. 1 sess.). with other correspondence not previously communicated to Congress, S. Doc. 237, 56 Cong. 1 sess.

Interoceanic Canal; Mr. Morgan, Com. on Interoceanic Canals, May 16, 1900, S. Rep. 1337, 56 Cong. 1 sess., parts 1 and 2.

Mr. Morgan, Com. on Interoceanic Canals, June 4, 1900, on the Clayton-Bulwer treaty, S. Report 1649, 56 Cong. 1 sess.

Mr. Hepburn, Com. on Interstate and Foreign Commerce, Feb. 17, 1900, H. Report 351, 56 Cong. 1 sess. Correspondence and other papers relating to the proposed Interoceanic Ship Canal, S. Doc. 161, 56 Cong. 1 sess.

An Isthmian Canal, S. Doc. 230, 56 Cong. 1 sess.

Cotton trade of the United States and an Isthmian Canal, S. Doc. 406, 56 Cong. 1 sess. Documents relating to the Interoceanic Canal, S. Doc. 357, 57 Cong. 1 sess.

List of books and articles in the Library of Congress, relating to the Interoceanic Canal, S. Doc. 59, 56 Cong. 1 sess.

As to particular routes and surveys, see:

Report of Lieut. Michler, July 14, 1857, on surveys for an interoceanic canal, S. Ex. Doc. 9, 36 Cong. 2 sess., 2 pts.

Report of Admiral Davis, July 11, 1866, on interoceanic canal and railway, S. Ex. Doc. 62, 39 Cong. 1 sess.

Message of President Fillmore, July 27, 1854, respecting a right of way across the Isthmus of Tehuantepec, S. Ex. Doc. 97, 32 Cong. 1 sess.

Lecture by Mr. Corthell, on Tehuantepec route, S. Doc. 34, 54 Cong. 1 sess.

Reports of Lull and Collins Expedition of 1875, with maps, S. Ex. Doc. 75, 45 Cong. 3 sess.

Report of Lieut. T. A. M. Craven, dated Feb. 18, 1859, of a survey made of the Isthmus of Darien, Mar. 18, 1880, H. Ex. Doc. 63, 46 Cong. 2 sess.

Report of historical and technical information relating to the problem of interoceanic communication by way of the American Isthmus, by Lieut. John T. Sullivan, U. S. N., with plates and maps, April 28, 1883, H. Ex. Doc. 107, 47 Cong. 2 sess.

Reports of Rear-Admiral G. H. Cooper and Lieut. R. P. Rodgers, U. S. N., respecting progress of work on the ship-canal across the Isthmus of Panama, with plates and maps, Mar. 12, 1884, S. Ex. Doc. 123, 48 Cong. 1 sess.

Report on the San Blas route, S. Report 774, 57 Cong. 1 sess.

Memorial on the Aputi route, S. Doc. 245, 57 Cong. 1 sess.

Ship canals on the Isthmus of Darien, S. Doc. 389, 56 Cong. 1 sess.

By the act of June 28, 1902, Congress authorized the President to acquire the rights of the New Panama Canal Company and to enter into a treaty with Colombia for the building of the canal across the Isthmus of Panama; and it also authorized him, in the event of failure to secure such a treaty after the lapse of a reasonable time, to enter into negotiations for the conclusion of a treaty for the construction of a canal by the way of Nicaragua.

The conclusion of a treaty with Colombia and the subsequent revolution on the Isthmus of Panama, after the failure of the Colombian Congress to ratify the treaty, have been detailed in § 344, supra.

November 18, 1903, a convention was signed at Washington with the Republic of Panamá. This convention was duly ratified and the ratifications were exchanged at Washington, February 26, 1904. By this agreement the United States guarantees the independence of the Republic of Panama, while the latter grants to the United States in perpetuity for the construction, operation, and protection of the canal, a zone 10 miles wide, extending the distance of 5 miles on either side of the middle line of the route of the proposed canal. This zone begins in the Caribbean Sea 3 marine miles from mean low-water mark, and extends across the Isthmus of Panama into the Pacific Ocean to a distance of 3 marine miles from mean low-water mark; but the cities of Panama and Colon and the adjacent harbors are not included in the grant. Within this zone, and also within the limits of all auxiliary lands and waters which may be necessary and convenient for the construction, operation, and protection of the canal or of any auxiliary works, the Republic of Panama grants to the United States all the rights, power, and authority which the latter would possess and exercise if it were the sovereign of the territory, "to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

By an order of June 24, 1904, the President of the United States declared the canal zone of the Isthmus of Panama to be open to the commerce of friendly nations, and established Ancon and Cristobal as ports of entry therein.

For. Rel. 1904, 8, 543, 585.

As to sanitary conditions on the Isthmus of Panama, see For. Rel. 1904, 552.

As to the transfer of the canal zone to the United States, see For. Rel. 1904, 582.

As to the payment of the canal indemnity, see For. Rel. 1904, 651.

As to the transfer of the property of the New Panama Canal Company to the United States, see For. Rel. 1904, 224, 302.

There is an article on the Panama Canal by Emory R. Johnson, in the *Political Science Quarterly*, June, 1903, p. 179.

See, also, Concha (José Vicente), *Las negociaciones diplomaticas del canal de Panama, cartas y documentos*. Bogotá, 1904.

#### V. SUEZ CANAL.

##### § 369.

November 30, 1854, the Viceroy of Egypt granted to M. Ferdinand de Lesseps a concession for cutting through the Isthmus of Suez a canal fit for ocean navigation. By Article I. of the concession M. de Lesseps undertook to form a company for that purpose, under the name of the Universal Company of the Suez Maritime Canal. By Article VI. it was provided that the rates of passage should be agreed on between the company and the Viceroy of Egypt and collected by the agents of the company, that they should "be always the same for all nations," and that "no special advantage" should ever be given "to the exclusive profit of any of them."<sup>a</sup>

By Article XIV. of another concession of January 5, 1856, the Viceroy of Egypt solemnly declared, subject to the ratification of the Sultan of Turkey, that the grand maritime canal from Suez to Péluse, and the ports dependent on it, should always be open as neutral passages to every merchant ship passing from one sea to the other, without any distinction, exclusion, or preference of persons or of nationalities, on condition of paying the tolls and complying with the regulations established by the Universal Company for the use of the canal and its dependencies. As a consequence of this principle it was further declared (Art. XV.) that the Universal Company should not in any case give to any ship, company, or private person any advantage or favor which should not be accorded to all other ships, companies, or private persons on the same conditions.<sup>b</sup>

By the by-laws of the Universal Company, adopted at Alexandria, January 5, 1856, the capital was fixed at 200,000,000 francs, represented by 400,000 shares of the value of 500 francs each.<sup>c</sup>

By a convention of August 6, 1860, between the Egyptian Government and the company, 177,642 shares were assigned to the Viceroy. It is stated that 207,111 shares were taken in France, and a few in Austria and the Netherlands. In 1875, the British Government bought from the Khedive of Egypt 176,602 shares, which were all that then remained in his possession, paying therefor 4,000,000 *l.* sterling, less the proportionate value of the 1,040 shares, the difference between 177,642 and 176,602.<sup>d</sup>

<sup>a</sup> 55 Brit. & For. State Pap. 970, 971.

<sup>b</sup> 55 Brit. & For. State Pap. 979.

<sup>c</sup> 55 Brit. & For. State Pap. 982.

<sup>d</sup> Blue Book, Egypt, No. 1 (1876), 7.

By Article I. of the convention of January 30, 1866, between the Egyptian Government and the company, it was agreed that the Egyptian Government should occupy, within the perimeter of the lands reserved as dependencies of the maritime canal, any strategic position or point which it should deem necessary to the defence of the country, such occupation not to be made an obstacle to navigation.<sup>a</sup> This provision is repeated in Article X. of the convention between Egypt and the company, signed at Cairo, February 22, 1866.<sup>b</sup> By Article XVII. of the same convention all prior acts, concessions, conventions, and statutes not inconsistent therewith were continued in force.

The Sultan of Turkey, by a firman of March 19, 1866, confirmed the convention of February 22, 1866.<sup>c</sup>

In 1885 representatives of the Great Powers, who had met in London to consider the financial condition of Egypt, adopted a declaration in which it was stated that their governments had agreed to appoint a commission of delegates to meet at Paris, March 30, 1885, for the purpose of drawing up a convention guaranteeing at all times and for all powers the freedom of the Suez Canal.<sup>d</sup> The commission met, but separated June 13 without coming to any conclusion. October 21, 1887, Lord Salisbury instructed the British embassy at Paris to lay before the French Government proposals for a convention following in the main the draft which was under discussion in 1885 and presenting on certain points alternative suggestions. Lord Salisbury remarked, however, that no instrument to which Great Britain and France might set their signatures could have any practical value till it had received the "assent of the suzerain and of the other powers concerned." He also stated that it was his duty to renew the words of a reservation made without opposition on any side by Sir Julian Pauncefote at the close of the sittings of the commission of 1885, as follows: "The British delegates, in presenting this draft of a treaty, as the definitive regulation intended to guarantee the free use of the Suez Canal, think it their duty to formulate a general reservation as to the application of these provisions, in so far as they may not be compatible with the transitory and exceptional condition of things actually existing in Egypt and may limit the freedom of action of their Government during the period of the occupation of Egypt by the forces of Her Britannic Majesty."<sup>e</sup>

A draft of a convention was signed by representatives of France and Great Britain at Paris, October 24, 1887, subject to the concurrence of the other powers represented on the commission at Paris in 1885.<sup>f</sup> This draft was communicated to those powers by the French Government. At the same time Lord Salisbury sent out for communication to the powers two circulars, one of which enclosed a copy

<sup>a</sup> 56 Brit. & For. State Pap. 274.

<sup>b</sup> 56 Brit. & For. State Pap. 277.

<sup>c</sup> 56 Brit. & For. State Pap. 293.

<sup>d</sup> Holland, *Studies in Int. Law*, 287.

<sup>e</sup> Blue Book, Egypt. No. 1 (1888), 35, 36.

<sup>f</sup> Blue Book, Egypt, No. 1 (1888), 45.

of his instructions to the British embassy at Paris of October 21, 1887, containing the reservation made by Sir Julian Pauncefote in 1885.<sup>a</sup> The draft having received the approval of the powers, it was formally signed at Constantinople, October 29, 1888, the signatory powers being Great Britain, Germany, Austria-Hungary, Spain, France, Italy, the Netherlands, Russia, and Turkey. The ratifications were deposited at Constantinople, October 22, 1888. This convention, after reciting the wish of the powers to establish "a definite system destined to guarantee at all times, and for all the Powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this Canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866 (2 Zilkadé, 1282), and sanctioning the Concessions of His Highness the Khedive," provides as follows:

Article I. The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

The Canal shall never be subjected to the exercise of the right of blockade.

Article II. The High Contracting Parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal; which engagements are stipulated in a Convention bearing date the 18th March, 1863, containing an *exposé* and four Articles.

They undertake not to interfere in any way with the security of that Canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

Article III. The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.

Article IV. The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I. of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the Regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Saïd and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power.

Article V. In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of

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<sup>a</sup>Blue Book, Egypt, No. 1 (1888), 48, Doc. No. 53.

war. But in case of an accidental hindrance in the Canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

Article VI. Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.

Article VII. The Powers shall not keep any vessel of war in the waters of the Canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power.

This right shall not be exercised by belligerents.

Article VIII. The Agents in Egypt of the Signatory Powers of the present Treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the Canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedivial Government of the danger which they may have perceived, in order that the Government may take proper steps to insure the protection and the free use of the Canal. Under any circumstances, they shall meet once a year to take note of the due execution of the Treaty.

The last-mentioned meetings shall take place under the presidency of a Special Commissioner nominated for that purpose by the Imperial Ottoman Government. A Commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman Commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the Canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

Article IX. The Egyptian Government shall, within the limits of its powers resulting from the Firmans, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the said Treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the Signatory Powers of the Declaration of London of the 17th March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles IV., V., VII., and VIII. shall not interfere with the measures which shall be taken in virtue of the present Article.

Article X. Similarly, the provisions of Articles IV., V., VII., and VIII. shall not interfere with the measures which His Majesty the Sultan and His Highness the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the Khedive, should find it necessary to avail themselves of the exceptions for which this Article provides, the Signatory Powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four Articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

Article XI. The measures which shall be taken in the cases provided for by Articles IX. and X. of the present Treaty shall not interfere with the free use of the Canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article VIII. is prohibited.



Article XII. The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty, agree that none of them shall endeavour to obtain with respect to the Canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover, the rights of Turkey as the territorial Power are reserved.

Article XIII. With the exception of the obligations expressly provided by the clauses of the present Treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

Article XIV. The High Contracting Parties agree that the engagements resulting from the present Treaty shall not be limited by the duration of the Acts of Concession of the Universal Suez Canal Company.

Article XV. The stipulations of the present Treaty shall not interfere with the sanitary measures in force in Egypt.

Article XVI. The High Contracting Parties undertake to bring the present Treaty to the knowledge of the States which have not signed it, inviting them to accede to it.

Article XVII. The present Treaty shall be ratified, etc.

Parl. Pap. Commercial. No. 2 (1889). 4.

In connection with the reservation made by Sir Julian Pauncefote at Paris in 1885, and renewed by Lord Salisbury in 1887, at the time of the submission of the convention for the assent of the powers, it may be observed that Mr. Curzon, Under Secretary of State for Foreign Affairs, speaking for the Government in the House of Commons, July 12, 1898, stated that, owing to the reservation in question, "the terms of the convention have not been brought into practical operation."<sup>a</sup>

June 25, 1898, Mr. Day, Secretary of State, cabled to Mr. Hay, United States ambassador in London: "We desire to send war ships through the Suez Canal. Mention the matter to the minister for foreign affairs; and, while discreetly assuming that no objection will be made, ascertain probable source of objection, if any, and attitude of the Government of Great Britain thereon. Prompt action is important."<sup>b</sup>

Mr. Hay immediately obtained an interview with Lord Salisbury, and, assuming that no objection would be made to the passage of United States ships-of-war through the canal, inquired "whether there had been any modification of the convention of 1888, which would go to place the nonsignatory powers on any different footing from those signing the convention." Lord Salisbury replied that there had been none, and Mr. Hay gathered from his remarks that he had no idea that any power would make any protest against the use of the canal by the United States, or that any protest would hold if it were made. "The attitude of the British Government," said Mr. Hay, "is that we are unquestionably entitled to the use of the canal for war ships."<sup>b</sup>

<sup>a</sup>Hansard, 4th series, LXI. 667.

<sup>b</sup>For. Rel. 1898, 982.

"I have to acknowledge the receipt of your No. 438 of the 25th ultimo, in which you convey the purport of your conversation with the Marquis of Salisbury in relation to the passage of the Suez Canal by ships of war.

"Your action in merely referring to the convention of Constantinople of October 29, 1888, in relation to the free navigation of the Suez Canal, as defining the attitude of the contracting parties on the subject, is approved.

"The object of the Department in telegraphing to you was threefold:

"1. It was desired to avoid even the possibility of objection being made to the use of the canal by our ships of war at a time when the need for such use might be immediate and imperative.

"2. The Department, while recognizing the general and unrestricted purpose of the convention of October 29, 1888, was not disposed wholly to rely upon it or formally to appeal to it, since the United States is not one of the signatory powers.

"3. The Department was not disposed, by a formal appeal to the convention, to recognize a general right on the part of the signatories to say anything as to the use of the canal in any manner by the United States.

"So far as the Department is advised, Great Britain is the only Government that owns any stock, or at any rate a considerable amount of stock, in the canal, and therefore the only one in a position to assert any claim of control on that ground.

"The Department is gratified with the response made by Lord Salisbury to your inquiry."

Mr. Day, Sec. of State, to Mr. Hay, amb. to England, July 14, 1898, For. Rel. 1898, 983.

By the convention of Constantinople the Suez Canal is not *neutralized*. This expression does not properly indicate the international position of the canal. If it were neutralized it would be closed to the ships of war of belligerents. Neither England nor France, nor any other state having possessions in the Far East, as Holland and Spain, would have been willing to concur in a diplomatic act by which the passage of the canal would have been forbidden to the ships of a belligerent state. The delegate of Russia expressed a wish that the Red Sea should be placed under the *régime* created by the convention, in order to assure access to the canal from the south in all circumstances. The delegates from Italy strongly opposed this proposition.

Bonfil, Manuel de Droit International Public (1894), 273.

The term *neutralization* has come to be used in a sense less strict than that indicated by the author, so as to include an arrangement whereby protection is sought to be guaranteed against hostile attack or hostile interruption, while the same freedom of use is sought to be assured in war as in peace. No doubt, however, the leading motive of agreements of neutralization is to secure exemption from hostile attack and a corre-

sponding prohibition of distinctive hostile use. When, by Article IX. of the treaty of Vienna, provision was made for the "neutrality of the Free Town of Cracow and its territory," it was declared in the same breath: "No armed force shall be introduced upon any pretense whatever." When, by Article XI. of the treaty of Paris, the Black Sea was "neutralized," the maintenance of armaments upon it was forbidden. In the neutralization of Luxemburg it was stipulated that the city of Luxemburg should no longer be treated as a federal fortress. By a treaty between Austria, France, Great Britain, Prussia, and Russia, signed at London November 14, 1863, the Ionian Isles were united to Greece and were neutralized. Article III. of the treaty declares that "as a necessary consequence of the neutrality to be thus enjoyed by the United States of the Ionian Islands, the fortifications constructed in the Island of Corfu and in its immediate dependencies, having no longer any object, shall be demolished." The treaties of March 30, 1856, November 2, 1865, and March 13, 1871, having effected the neutralization of the Lower Danube and of the works constructed in aid of its navigation, the treaty of Berlin of July 13, 1878, provided (Article LII.) that "all the fortresses and fortifications existing on the course of the river from the Iron Gates to its mouths" should be "razed, and no new ones erected." The Argentine Republic and Chile, by their treaty of July 23, 1881, declare: "ARTICLE V. The Straits of Magellan are neutralized forever, and their free navigation is guaranteed to the flags of all nations. To insure this neutrality and freedom, it is agreed that no fortifications or military defenses which might interfere therewith shall be erected."

As to the Straits of Magellan, see Abribat, *Le Détroit de Magellan au point de vue international*: Paris, 1902.

Concerning the neutralization of the Suez Canal, Bonfils cites Twiss, *La neutralisation du canal de Suez*, Rev. de Droit Int. VII. (1875), 628; *De la sécurité de la navigation dans le canal de Suez*, Rev. de Droit Int. XIV. (1882), 572; *Le canal de Suez etc.*, Rev. de Droit Int. XVII. (1885), 615; Asser, *Le canal de Suez et la convention de Constantinople*, Rev. de Droit Int. XX. (1888), 529; F. de Martens, *La question égyptienne et le Droit int.*

See, also, T. J. Lawrence, *Essays on Int. Law*, 41. 142; Gaignerot, *La question d'Égypte* (Paris, 1901), 337 et seq.

As to the neutralization of canals, see Fauchille, *Blocus Maritime* (Paris, 1882), 184 et seq.

While a natural thoroughfare, although wholly within the dominion of a Government, may be passed by commercial ships, of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases. (The Avon, 18 Int. Rev. Rec., 165.)

## VI. CORINTH CANAL.

### § 370.

The Corinth Canal was opened August 24, 1893. It is about six kilometres long. It is wholly within the territory of Greece, and forms part of its territorial waters. The rights of property, sovereignty, and jurisdiction all belong to Greece. The canal is not directly connected with the great navigation of the Mediterranean. The Suez Canal is of general interest, the Corinth of secondary inter-

est. It facilitates the relations of the Adriatic with Eastern Greece, the Bosphorus, Asia Minor, and the Black Sea. The Suez Canal unites all Europe, both Central and Western India, the Indian Ocean, the Far East, East Africa, and Australia.

Bonfils, *Manuel de Droit International Public* (1894), 274.

## VII. KIEL CANAL.

### § 371.

A maritime canal unites the Bay of Kiel to the mouth of the Elbe. Its construction was due, not to individual initiative, but to the German Empire, the reasons being strategic rather than commercial. Its object was to establish easier communication between the two German arsenals of Wilhemshaven and Kiel, and to enable the German fleets to avoid the Danish Sound and Belts and escape a passage under the fire of Danish guns. The commerce of Hamburg and of Bremen with the Baltic will, however, derive advantage from the opening of this way of communication. The canal, which is about 98 kilometres long, is not international. Property, sovereignty, jurisdiction, administration and management all belong to the German Empire.

Bonfils, *Manuel de Droit International Public* (1894), 274, citing Fleury, *Canaux maritimes*, *Revue des deux mondes*, November 15, 1898.

July 18, 1901, Mr. White, American ambassador at Berlin, reported that in accordance with a request made by the embassy "permission" had been granted to the U. S. S. *Enterprise* to pass through the Kaiser Wilhelm (Kiel) canal *en route* to the North Sea, the request having been made by the embassy at the instance of the commander of the ship. The embassy subsequently reported, on information furnished by the American consular agent at Kiel, that the canal dues paid by the *Enterprise* amount to 400 marks and those by the U. S. S. *Buffalo* to 900 marks, which, considering the saving in time and coal, would apparently indicate that it was less expensive for the ships to go through the canal than to round the Danish peninsula. (Mr. White, ambassador at Berlin, to Mr. Hay, Sec. of State, July 18, 1901; Mr. Jackson, chargé at Berlin, to Mr. Hay, Sec. of State, Oct. 19, 1901: *For. Rel.* 1901, 184.)

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## I. SOURCES OF NATIONALITY.

## § 372.

National character, in legal and diplomatic discussions, usually is denoted by the term "citizenship." In most cases this is not misleading, since citizenship is the great source of national character. It is not, however, the only source. A temporary national character may be derived from service as a seaman, and also, in matters of beligerency, from domicile, so that there may exist between one's citizenship and his national character, for certain purposes, an actual diversity. For these reasons, in my work on International Arbitrations, I gave to the chapter in which citizenship is discussed the title "Nationality," in order that it might comprehend not only those who may be called "citizens," but also all those who, whether they be citizens or not, may be called "nationals."

Citizenship, strictly speaking, is a term of municipal law, and denotes the possession within the particular state of full civil and political rights, subject to special disqualifications, such as minority or sex. The conditions on which citizenship is acquired are regulated by municipal law.

In American law the term "citizen" or "citizenship" is used to denote a relation to the various States as well as to the United States. The conditions of State citizenship greatly vary in the several States, some requiring as a prerequisite of the exercise of the elective franchise the possession of citizenship of the United States, while others require only a declaration of intention to become a citizen of the



United States, coupled with some qualification of residence. Citizenship of a State does not, however, confer citizenship of the United States; and it is only those who are citizens of the United States that can be considered as possessing, on the ground of citizenship, American nationality. It is an anomaly, under the American system, that, as the result of leaving the qualifications of electors to the determination of the several States, a person may, if he happen to live in a particular State, exercise the highest electoral privileges, and by his vote potentially decide the fate of a national election, though he is not a citizen of the United States nor clothed with American nationality.

It is proper to call attention to the fact that the words "citizen," "citizenship," "domicil," and "expatriation," are not used, in the extracts in the present chapter, in a uniform sense. By "citizen," a domiciled person or even a mere resident seems sometimes to be meant; "domicil" is at times used in the sense of residence, not definitive, but more or less prolonged; while "expatriation," in some passages, evidently signifies a change of residence or of domicil, and not a change of home and allegiance. It is equally obvious that, by reason of these diversities, supposed precedents have sometimes been misconceived; and, following the course pursued in the rest of the work, I have endeavored to correct this defect by giving, as far as possible, a summary of the facts with reference to which the phrases were employed, instead of the words alone.

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other—allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more."

Citizens are members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

United States *v.* Cruikshank, 92 U. S. 542, 549.

The term "subjects" in the 15th article of the Spanish treaty of 1795, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions.

The Pizarro, 2 Wheat. 227.

Questions as to citizenship are determined by municipal law in subordination to the law of nations.

Stanbery, At. Gen., 1867, 12 Op. 319.

In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue.

Hauenstein *v.* Lynham, 100 U. S. 483.

A person disfranchised as a citizen by conviction for crime under the laws of the United States can be restored to his rights as such by a free and full pardon from the President, and such pardon may be granted after he has suffered the other penalties incident to his conviction as well as before.

Black, At. Gen., 1860, 9 Op. 478.

"We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State; but his rights of citizenship under one of these governments will be different from those he has under the other."

Walte, C. J., United States *v.* Cruikshank, 92 U. S. 542, 549.

Although by the fourteenth amendment to the Constitution citizens of the United States are declared to be citizens of "the States wherein they reside," citizenship of a State does not confer citizenship of the United States. (Boyd *v.* Thayer, 143 U. S. 135; Minneapolis *v.* Reum, 56 Fed. Rep. 576, 6 C. C. A. 31; United States *v.* Rhodes, 1 Abb. U. S. 28, 40.)

As to the law of citizenship in various countries, the following references may be noted:

- Argentine Republic: For. Rel. 1882, 1.  
 Colombia: For. Rel. 1885, 204.  
 Costa Rica: Law of Dec. 20, 1886, For. Rel. 1887, 95.  
 France: Code Napoleon, For. Rel. 1873, 1276; Law of June 26, 1889, For. Rel. 1890, 276; Amendments of 1893, For. Rel. 1893, 295, 303.  
 Germany: Law of 1870, For. Rel. 1886, 318.  
 Great Britain: Report of Royal Commission, For. Rel. 1873, 1232.  
 Guatemala: For. Rel. 1894, 317.  
 Mexico: Law of May 28, 1886, For. Rel. 1886, 653; For. Rel. 1895, 1013; Moore, Int. Arbitrations, III. 2450-2454.  
 Netherlands: Law of July 1, 1893, For. Rel. 1893, 472.  
 Norway: For. Rel. 1888, II. 1490-1495.  
 Salvador: Law of Sept. 27, 1886, For. Rel. 1887, 69.  
 Spain: Moore, Int. Arbitrations, III. 2454.  
 Switzerland: For. Rel. 1876, 567; For. Rel. 1897, 557.  
 Turkey: Law of Jan. 19, 1869, For. Rel. 1893, 714.  
 Venezuela: Constitution, June 12, 1893, For. Rel. 1893, 731; Moore, Int. Arbitrations, III. 2456.  
 See, also, as to the law in many countries, Opinions of the Heads of the Executive Departments, and other papers relating to Expatriation, Naturalization, and Change of Allegiance, Washington, 1873; reprinted in For. Rel. 1873, II. 1179-1438.

## II. CITIZENSHIP.

### 1. BY BIRTH.

Citizenship by birth may exist (1) by reason of birth in a particular place—i. e., *jure soli*, and (2) by reason of the nationality of the parents—i. e., *jure sanguinis*.

See Cockburn on Nationality (London, 1869), 6-14; Moore, Int. Arbitrations, III. 2449 et seq.

### (1) BY RIGHT OF PLACE.

#### § 373.

“In reply to the inquiry which is made by you in the same letter whether ‘the children of foreign parents *born in the United States*, but brought to the country of which the father is a subject, and continuing to reside within the jurisdiction of their father’s country, are entitled to protection as citizens of the United States,’ I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship. There is not, however, any United States statute containing

Common-law doctrine.

a provision upon this subject, nor, so far as I am aware, has there been any judicial decision in regard to it."

Mr. Marcy, Sec. of State, to Mr. Mason, June 6, 1854, MS. Inst. France, XV. 196.

As to the status of free men of color, see opinion of Mr. Marcy, in Moore, Int. Arbitrations, III. 2461-2462.

Children born in the United States of alien parents, who have never been naturalized, are native citizens of the United States.

Bates, At. Gen., 1862, 10 Op. 321. See *United States v. Rhodes*, 1 Abb. U. S. 28; *Lynch v. Clarke*, 1 Sandf. Ch. 584; Black, At. Gen., 1859, 9 Op. 373.

See comment in Mr. Bayard, Sec. of State, to Mr. de Bounder, Belg. min., April 2, 1888, For. Rel. I. 48.

By Article III. of the convention with Great Britain of 1818 it was agreed that the Oregon territory should "be free and open" "to the vessels, citizens, and subjects of the two powers;" and this convention was continued in force until 1846. It has been held that, during the period of joint occupation, the country, as to British subjects therein, was British soil, and subject to the jurisdiction of the King of Great Britain; that, as to citizens of the United States, it was American soil, and subject to the jurisdiction of the United States; and that a child born in the territory in 1823 of British subjects, was born in the allegiance of the King of Great Britain, and not in that of the United States.

*McKay v. Campbell*, 2 Sawyer, 118.

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

Civil Rights Act.

Rev. Stats., § 1992; sec. 1, Civil Rights Act, April 9, 1866, 14 Stat. 27.

As to persons of African descent, previously, see Mr. Marcy, Sec. of State, to Mr. Barry, consul at Matamoras, Jan. 8, 1855, 20 MS. Desp. to consuls, 109; 2 MS. Op. Mex. Com. (1868) 293, case of Matthieu.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Fourteenth amendment.

Fourteenth Amendment to the Constitution of the United States, proposed to the States June 16, 1866, declared ratified by concurrent resolution of July 21, 1868, promulgated July 20 and July 28, 1868. (Mr. Bayard, Sec. of State, to Mr. de Bounder, Belg. min., April 2, 1888, For. Rel. 1888, I. 48.)

See *Polit. Science Quarterly*, V. 104; *Doc. Hist. Constit.* II. 783, 788.

That American Indians, living in tribal relations, are not "subject to the jurisdiction" of the United States, in the sense of the 14th amendment, see *McKay v. Campbell*, 2 Sawyer, 119; *Karrahoov v.*

Adams, 1 Dillon, 344; *Ex parte Reynolds*, 18 Alb. L. J. 8; 15 Am. Law Rev. 21; *Jackson v. United States*, 34 Ct. Cl. 441; *O'Brien v. Bugbee*, 46 Kan. 1; *Elk v. Wilkins*, 112 U. S. 94.

As to who are Indians, see *In re Camille*, 6 Sawyer, 541; *Alberty v. United States*, 162 U. S. 499; *United States v. Ward*, 42 Fed. Rep. 320; *Hilgers v. Quinney*, 51 Wis. 62.

As to the status of the Alaskan Indians under the *modus vivendi* of Oct. 20, 1899, see Mr. Adee, Act. Sec. of State, to Mr. French, Aug. 27, 1900, 247 MS. Dom. Let. 355. For the *modus vivendi*, see *supra*, § 107.

See an article on Natural-born citizens of the United States, and Eligibility for the office of President, by Alex. Porter Morse, in 66 Albany Law Journal (April, 1904) 99.

“It results from inquiry that John Peter Harboro was born in Philadelphia, November 17, 1852, and that his father was not naturalized until November 6, 1860. The 14th amendment to the Constitution declares that ‘all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.’”

Variant constructions.

“This is simply an affirmance of the common law of England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, ‘and subject to the jurisdiction thereof,’ was probably intended to exclude the children of foreign ministers, and of other persons who may be within our territory with rights of extraterritoriality. It is, indeed, possible to read the language as meaning *while* or *when* they are subject to the jurisdiction of the United States, but this would denationalize all citizens, native or naturalized, the moment they entered a foreign jurisdiction. A contemporaneous exposition of this amendment was given by the 3d section of the act of Congress of July 27, 1868 (15 Stat. 224).”

Mr. Fish, Sec. of State, to Mr. Marsh, May 19, 1871, MS. Inst. Italy, I. 350. See, to the same effect, Mr. Fish, Sec. of State, to Mr. Ellis, April 14, 1873, 98 MS. Dom. Let. 385; to Mr. Van Horn, June 13, 1873, 102 MS. Dom. Let. 437.

See, however, Mr. Evarts, Sec. of State, to Mr. Willins, March 14, 1879, 127 MS. Dom. Let. 178, and Mr. F. W. Seward, Act. Sec. of State, to Mr. Fish, Aug. 20, 1878, MS. Inst. Switz. I. 459, in both of which uncertainty is indicated as to the construction to be given to the meaning of the phrase “subject to the jurisdiction thereof.”

Ludwig Hausding was born in the United States, but during infancy was removed by his father, who was a Saxon subject, to Saxony, where he ever afterwards remained. The father subsequently became a citizen of the United States by naturalization. In 1884 Ludwig applied to the American legation in Berlin for a passport, but the legation refused to grant it on the ground that he was born of Saxon subjects, who were only temporarily in the United States,

and was never "dwelling in the United States," either at the time of or since his parent's naturalization, and was not naturalized by force of section 2172, Revised Statutes. With reference to this decision the Department of State said: "Not being naturalized by force of the statute, Ludwig Hausding could only assert citizenship on the ground of birth in the United States; but this claim would, if presented, be untenable, for by section 1992, Revised Statutes, it is made a condition of citizenship by birth that the person be not subject to any foreign power. . . . Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation: That the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute."

Mr. Frellinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 394.

A youth applied to the American legation in Berne, Switzerland, in 1885, for a passport as a citizen of the United States. He was born in New York September 7, 1866, and was described as the illegitimate son of a widow originally from Switzerland, who appeared to have been residing in New York at the time of his birth. Whether her late husband was a citizen of the United States was uncertain, but when she returned to Switzerland, four years after her illegitimate son's birth, she obtained a passport from the American legation as a citizen of the United States. She resided in Switzerland till her death, and her son had also continued to live there up to the time of his application for a passport. The Department of State said that he was "so far a citizen of the United States" that he might, on reaching his majority, "elect which nationality he will adhere to, the United States or Switzerland," and that he was meanwhile to be considered as an American citizen residing in Switzerland, entitled to the protection of the United States and consequently to a passport.

Mr. Frellinghuysen, Sec. of State, to Mr. Cramer, min. to Switzerland, Feb. 13, 1885, For. Rel. 1885, 794.

No inquiry seems to have been made in this case as to whether this illegitimate child, born in the United States, was, under the circumstances stated, in any sense a citizen of Switzerland under the laws of that country.

Richard Greisser was born in the United States in 1869. His father, a German subject, came to America in 1867, and in 1868 married there a Swiss lady, but in 1870, without having become a citizen of the United States or declared his intention to do so, returned to Germany, taking with him his wife and child. The

Department of State said: "Richard Greisser was no doubt born in the United States, but he was on his birth 'subject to a foreign power' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute [act of 1866, R. S. § 1992] and the Constitution [XIVth Amendment] a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship."

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Nov. 28, 1885, For. Rel. 1885, 814, 815. See, also, p. 813.

A child born in the United States, whose parents, though of Chinese descent and subjects of the Emperor of China, are domiciled in the United States, is a citizen of the United States by birth, within the meaning of the Fourteenth Amendment.

**Decision of Supreme Court.**

United States v. Wong Kim Ark (1898), 169 U. S. 649.

For a review of the prior judicial *dicta*, to the effect that the phrase "subject to the jurisdiction thereof" included not only the children of diplomatic agents, but also children who bore a foreign allegiance *jure sanguinis*, see Moore's Am. Notes, Dicey's Conflict of Laws, 201. In the case of *In re Look Tin Sing*, 21 Fed. Rep. 905, however, it was held that a child born in the United States to alien Chinese parents, who could not themselves become naturalized, was nevertheless a citizen by birth; and, if this were so, the child born of parents who were subject to no disability would a fortiori be a citizen. The decision of the Supreme Court in the case of *Wong Kim Ark*, affirming the principle laid down in the case of *Look Tin Sing*, authoritatively settles the question as to the children of domiciled aliens.

See, also, *Gee Fonk Sing v. United States*, 49 Fed. Rep. 146; *Benny v. O'Brien* (N. J.), 32 Atl. 686; *Ex parte Ching King*, 35 Fed. Rep. 354; Mr. Wharton, Act. Sec. of State, to Mr. Johnson, July 24, 1891, 182 MS. Dom. Let. 583; Mr. Gresham, Sec. of State, to Mr. Runyon, amb. to Germany, April 19, 1895, For. Rel. 1895, I. 536; Mr. Day, Sec. of State, to Mr. Denby, min. to China, May 26, 1898, For. Rel. 1898, 203.

The laws restricting the immigration of Chinese are inapplicable to persons of Chinese descent who are, by birth in the United States, citizens thereof. (86 Fed. Rep. 553.) See, however, *infra*, § 570.

In a memorandum of April 16, 1901, the Imperial German embassy drew attention to a decision of the Treasury Department of February 28, 1899, which seemed to be in conflict with the previous determinations of the Department of State, of the Attorney-General, and of the Supreme Court. By this decision it was held that a child born in the United States of unnaturalized aliens and taken abroad by its father should, upon his return to the United States, be con-

sidered an alien immigrant. In a memorandum of May 27, 1901, the Department of State replied that the decision of the Treasury Department had been overruled by the district court of the United States for the southern district of New York, which decided that the two American-born children of certain Italians were, as citizens of the United States, entitled to admission into the country. It was added that the Secretary of the Treasury had accepted the decision of the court as binding upon his Department.

For. Rel., 1901, 175, citing 93 Fed. Rep. 659. For the Treasury Department's prior opinion see decision No. 20747, Feb. 28, 1899.

**Case of a found-ling.** Jules Michot applied to the legation of the United States at Berne for a passport. While it was declared in his application that he was a native citizen of the United States, born in the city of Philadelphia, it was also stated that he knew nothing of his origin except what was set forth in the petition presented by his adopted mother, Rosalia Michot, to the court of common pleas No. 3, in Philadelphia, for his adoption, which was duly granted. The petitioner swore that the child was left with her near Philadelphia when it was about three months old, and that she knew nothing of its parentage or place of birth. Michot thought that the woman was really his mother, but of this there was no evidence, except that of filial association with her. But on the strength of "the presumption that the child was born in the country where its existence first became known," it was held that upon the circumstances set forth the applicant was entitled to be treated as a native citizen of the United States and to receive a passport accordingly.

Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switzerland, July 12, 1899, For. Rel. 1899, 760.

**Children of diplomatic officers.** "The complainants are both citizens of France. The fact that one of them was born in Peking, China, does not change his citizenship. His father was a Frenchman, and by the law of France a child of a Frenchman, though born in a foreign country, retains the citizenship of his father. In this case, also, his father was engaged, at the time of the son's birth, in the diplomatic service of France, being its minister plenipotentiary to China, and by public law the children of ambassadors and ministers accredited to another country retain the citizenship of their father."

Geofroy v. Riggs (1890), 133 U. S. 258, 264.

Mr. Mazel was born in the United States Sept. 17, 1869. His father was then Dutch minister at Washington and had married an



American woman. In 1871 the family removed to Europe, and afterwards resided at various capitals, where the father served in a diplomatic capacity. In 1891 the son desired to come to the United States and exercise the privileges of citizenship. The Department of State expressed the opinion that he could do so only after being naturalized, since a child born in the United States to a diplomatic officer was not "subject to the jurisdiction thereof" in the sense of the Fourteenth Amendment.

Mr. Wharton, Act. Sec. of State, to Mr. Grant, min. to Aust.-Hung., Aug. 10, 1891, For. Rel. 1891, 21.

(2) BY RIGHT OF BLOOD.

§ 374.

By section 1993 of the Revised Statutes of the United States, incorporating the provisions of the act of February 10, 1855, "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

See *Ludlam v. Ludlam*, 26 N. Y. 356; *Albany v. Derby*, 30 Vt. 718; *Ware v. Wisner*, 50 Fed. Rep. 310.

Children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States, nor entitled to protection as such.

*Williams*, At. Gen., 1873, 14 Op. 295.

"The fourteenth amendment to the Constitution declares that—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' . . .

"It is provided by the act of 1855 (10 Stat. at Large, p. 604) that persons born out of the limits and jurisdiction of the United States, whose fathers at the time of their birth are citizens of the United States, shall be deemed and considered to be citizens of the United States, provided that the right of citizenship shall not descend to persons whose fathers never resided in the United States.

"I will presently refer to this proviso.

"Within the sovereignty and jurisdiction of the United States the persons contemplated by the act are entitled to all the privileges of citizenship; but while the United States may by law fix or declare the conditions constituting citizenship within its own territorial jurisdiction, and may confer the rights of American citizenship everywhere upon persons who are not rightfully subject to the authority of any

foreign country or government, it may be safely assumed that Congress did not contemplate the conferring of the full rights of citizenship upon the subject of a foreign nation who had not come within our territory, so as to interfere with the just rights of such nation to the government and control of its own subjects.

“It is a well-established principle of public law that the municipal laws of a state have no effect within the limits of another power, beyond such as the latter may think proper to concede to them.

“No foreign state can by its municipal legislation release from his obligation to the United States a person born within its territory and its jurisdiction who has continued from his birth to reside therein; and while he resides therein, and if, by the laws of the country of their birth, children of American citizens born in such country are subjects of its government, the legislation of the United States should not be construed so as to interfere with the allegiance which they owe to the country of their birth while they continue within its territory, or until they shall have relieved themselves of that allegiance and have assumed their rights of American citizenship, in conformity with the laws and Constitution of the country, and have brought themselves personally within its jurisdiction.

“I have above referred to the proviso to the act of 1855. It is evident from this that the law-making power not only had in view the limit (above referred to) to the efficiency of municipal law in foreign jurisdiction, but intended that a distinction be observed between the right of citizenship, declared by the act of 1855, and the full citizenship of persons born within the territory and jurisdiction of the United States, for those declared to be citizens by the act could not transmit citizenship to their children without having become residents within the United States; the heritable blood of citizenship was thus associated unmistakably with residence within the country, which was thus recognized as essential to full citizenship.

“The provisions of the fourteenth amendment of the Constitution have been considered. This amendment is not only of more recent date, but is a higher authority than the act of Congress referred to, and if there be any conflict between them, or any difference, the Constitution must control, and that makes the subjection of the person of the individual to the jurisdiction of the Government a requisite of citizenship.

“It does not necessarily follow from this that the children of American parents born abroad may not have the rights of inheritance, and of succession to estates, although they may not reside within or ever come within the jurisdiction of the United States. That question is not within the present consideration.”

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873,  
For. Rel. 1873, I. 256.

"Your letter in regard to the possibility of a claim on the part of the French Government to exact military service of your son, Caspar Schuyler Crowninshield, on the ground of his birth in France and personal residence there, has been received.

"The clause of the French law of nationality which the secretary of embassy seems to suppose applicable to your son's case (article 8) reads as follows: 'These are French . . .

"4. Any person born in France of foreign parents and who at the time of his majority is domiciled in France, unless within the year following such majority, as fixed by French law, he has declined French nationality and proved that he has retained the nationality of his parents by means of an attestation in due form from his Government, which attestation shall remain attached to his declaration, and by producing, besides, if there is occasion to do so, a certificate showing that he has complied with the call to perform military service in accordance with the military laws of his country.

"This provision appears to concern those persons who, being born in France of foreign parents, continue to dwell there during minority, and treating them as invested with a dual status, gives them one year after attaining majority within which to elect either French nationality or that of their parents. It does not appear to affect those who, like your son, have been removed from France soon after birth and thereafter dwell and come of age in the country of their parents' allegiance. Your son, born at Nice, June 1, 1871, was taken thence by his parents a few weeks later, July 4, 1871, and never returned to France until last October, when, being over 23 years of age, he went to Paris as an art student.

"No claim to your son's military service appears to have been made by the French authorities, but a copy of your letter and of this reply will be sent to the United States ambassador at Paris, and Mr. Eustis will be instructed that, in the event of any such claim, this Government would hold that your son, being born a citizen of the United States, under our laws has conserved his status and perfected it, as against any conflicting claim on the part of France, by continuous domicile in the United States during minority and entrance upon all the rights of American citizenship on attaining majority.

"Without discussing the hypothetical question whether, in such a case, option and declaration are required in France within the year after attaining majority, it is clear that the year having elapsed without your son having been within French jurisdiction no retro-active declaration can now be demanded of him. He is to be regarded as having precisely the same status in France as any other adult citizen of the United States visiting that country; and Mr. Eustis will be instructed to attest the fact of such citizenship by the issuance of a passport to him on the usual evidence of right thereto."

Mr. Gresham, Sec. of State, to Captain Crowninshield, U. S. N., Feb. 23, 1895, For. Rel. 1895, I. 426.

As stated in his letter, Captain Crowninshield, at the time of his son's birth, was serving on a U. S. man-of-war and his wife was residing temporarily at Nice.

See, as to another case of a child born to American parents temporarily abroad, Mr. Hill, Act. Sec. of State, to Mr. White, No. 1210, June 14, 1901, MS. Inst. Germany, XXI. 298.

T., a native of Germany, was naturalized in the United States in 1887. In 1889, while on a visit with his wife to Germany, a son was born to him. The child was soon afterwards brought to the United States. In 1901 T., who contemplated sending his son to Germany for purposes of study, sought the interposition of the United States in order that he might be assured that the American citizenship of his son would be recognized by the German Government. The German foreign office stated that there was nothing to prevent the American citizen in question from making a prolonged stay in Germany.

For. Rel. 1901, 179.

A person born on board of a United States vessel, of parents who are citizens of the United States, but who are, at the time, in a foreign country, not with the design of removing thither, but only having touched there in the course of a voyage which the father has made as captain of the vessel, is to be regarded as a citizen of the United States.

United States v. Gordon, 5 Blatch. 18.

Under § 1993 nationality is not inherited through women; and an illegitimate child born abroad to an American woman is not a citizen of the United States.

**Illegitimacy.**

Opinion of Mr. Lowndes, for the Commission, United States and Spain. Claims Com. (1871), Moore, Int. Arbitrations, III. 2462; Mr. Wharton, Asslt. Sec. of State, to Mr. Lewis, Dec. 24, 1891, 184 MS. Dom. Let. 497.

July 30, 1901, the Swiss legation at Washington made an inquiry as to the nationality of Louis Rover, who was born out of wedlock in France, in 1888, his father being Léon Jean Rover, a native citizen of the United States, and his mother a French woman. The parents were married in 1891, in London, but they afterwards separated, the child being left with the mother. The legation inquired whether by the laws of New York he was legitimized by the marriage of his parents and had thus become an American citizen. The Department of State replied:

"The attorney-general of the State of New York, under date of the 16th instant, declares it to be his opinion that by section 18 of the domestic regulations law of the State of New York, chapter 272 of the laws of 1896, as amended by chapter 725 of the laws of 1899, 'an illegitimate child, whose parents have not heretofore intermarried or shall hereafter intermarry, shall thereby become legitimized and shall become legitimate for all purposes, entitled to all the rights and privileges of a legitimate child; but an estate or an interest vested or trust created before the marriage of a parent of such child shall not be divested or affected by reason of such child being legitimized.'

"Section 1993 of the Revised Statutes of the United States provides that 'all children heretofore or hereafter born out of the limits and jurisdiction of the United States whose fathers were or may be at the time of their birth citizens thereof are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers have never resided in the United States,' and section 1992 declares all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, to be citizens of the United States.

"Assuming that the father of Louis Rover, Léon Jean Rover, who was born in New York, had never renounced his American citizenship acquired by his birth, it is the opinion of the Department that Louis Rover, born in France in 1888 of a French mother, became a citizen of the United States by the subsequent marriage of his parents in 1891, in pursuance of section 18 of the domestic relations law of New York, cited at the beginning of this note."

Mr. Hay, Sec. of State to Mr. Lardy, Swiss chargé, Aug. 23, 1901, For. Rel. 1901, 512.

In the case of a person born in China whose father was a citizen of the United States and whose mother was a Chinese woman, it was held that as the "father was an American citizen the nationality of his mother previous to marriage would make no difference in the son's nationality, provided he was legitimate, unless the father was a citizen of one of the States which prohibit marriage with Chinese, of which there is no allegation in the present instance."

Mr. Bayard, Sec. of State, to Mr. Smithers, chargé at Peking, May 4, 1885, For. Rel. 1885, 171.

Accompanying this instruction there is an opinion of Dr. Francis Wharton, law officer of the Department of State, dated April 29, 1885. As the facts were reported to the Department of State it was not clear whether the son was born in wedlock. On this question a further investigation was directed to be made, but it was remarked by Dr. Wharton in his report that "the rule of law undoubtedly is that, in doubtful cases, the presumption in favor of legitimacy is to control." (For. Rel. 1885, 172.)

Half-castes born in Samoa, of American fathers by Samoan women, with whom the fathers lived "fa'a Samoa," are not citizens of the United States.

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, consul-general at Apia, April 26, 1888, S. Ex. Doc. 31, 50 Cong. 2 sess. 55, 125 MS. Inst. Consuls, 118; supra, § 234.

Mr. F. W. Seward, in reply to a question as to the nationality of Samoan half-castes, born of American fathers and native mothers, gave an answer based on the assumption that §1993 applied to such offspring and that they had a double nationality. It seems, however, that his attention was not drawn to the nature of the relations between the parents in such cases, nor was anything said by him on the subject. (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Coe, commercial agent at Apia, Feb. 11, 1867, 45 MS. Desp. to Consuls, 63.)

See Mr. Adee, Act. Sec. of State, to Mrs. Forsayth, Oct. 25, 1890, 179 MS. Dom. Let. 497.

"The law officers have . . . reported with reference to inquiries made . . . by certain half-castes residing in Fiji, as to the protection which could be granted to them on account of their British origin, in connection with the establishment of a *de facto* government, that the half-castes in question appear to be illegitimate children of Fiji women, and to have been born in Fijian territory, and that, consequently, their nationality is not British, and that they are not entitled to British protection."

Circular of Lord Kimberley to the governors of Australian colonies, Aug. 14, 1872, Blue Book, C. 983, April, 1874, pp. 22, 23.

As has been seen, by § 1993 the children of fathers who never  
**Continuous nation-** resided in the United States are not American  
**ality.** citizens.

Mr. Adee, Act. Sec. of State, to Mr. Terres, No. 141, Sept. 25, 1893, MS. Inst. Hayti, III. 346.

"The Department recently made a careful and thorough examination of the question of the status of citizens of the United States who are members of continuous communities of American nationality existing in Turkey for business or religious purposes. . . .

"(1) Persons who are members in Turkey of a community of citizens of the United States, of the character above described, do not lose their domicile of origin, no matter how long they remain in Turkey, provided that they remain as citizens of the United States, availing themselves of the extraterritorial rights given by Turkey to such communities, and not merging themselves in any way in Turkish domicile or nationality.

"(2) The American domicile they thus retain they impart to their descendants, so long as such descendants form part of such distinctive American communities, subject to the above proviso.

“(3) Section 1993 of the Revised Statutes, providing that ‘the rights of citizenship shall not descend to children whose fathers never resided in the United States,’ does not apply to the descendants of citizens of the United States, members of such communities. Such descendants are to be regarded, through their inherited extra-territorial rights recognized by Turkey herself, as born and continuing in the jurisdiction of the United States. That this is the construction to be given to section 4125 of the Revised Statutes, coupled with our treaty of 1830 with Turkey, is fully shown by the above-mentioned instruction of April 20, 1887, to which I again refer as binding you in this relation.”

Mr. Porter, Act. Sec. of State, to Mr. Emmet, consul at Smyrna, Aug. 9, 1837, For. Rel. 1887, 1125; approved in Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, Aug. 11, 1887, For. Rel. 1887, 1120-1125.

For the instruction of April 20, 1887, see For. Rel. 1887, 1094; and *infra*, § 870.

See Mr. Porter, Act. Sec. of State, to Mr. Emmet, No. 14, March 30, 1887, 120 MS. Inst. Consuls, 638.

“I have now to add that the Department considers as citizens of the United States all non-Mahometans descended from citizens of the United States (not naturalized Turks) whose parents or prior ancestors settled in Turkey for religious or business purposes, and who themselves remain non-Mahometans, retain and proclaim their American nationality, and are recognized by Turkish authorities as citizens of the United States.”

Mr. Rives, Assl't. Sec. of State, to Mr. Emmet, No. 30, Jan. 11, 1888, 123 MS. Inst. Consuls, 584.

“The purpose of this statute [§ 1993] was to define and limit the rights of citizenship of children of citizens of the United States born out of the limits and jurisdiction thereof, in order that such rights might not be abused. It is, however, believed that the limitations of the act do not apply to a country like Samoa, where citizens of the United States, although beyond the limits thereof, are not outside of its jurisdiction, but subject thereto under express conventional provisions. As citizens of the United States in such a country are expressly exempt from the operation of the local laws and are answerable only to the laws of their own country, no conflict of laws can arise, and registration in the United States consulate may be regarded as sufficient election of American citizenship.

“Of course there is nothing in the laws of the United States to prevent a citizen of the United States from expatriating himself and assuming allegiance to any government of which he may desire to become a citizen, and should it appear in any case that a citizen

of the United States, who had been under your protection, had expatriated himself, you would decline further to treat him as an American citizen."

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, consul-general at Apla, No. 28, Jan. 6, 1888, 123 MS. Inst. Consuls, 532.

## 2. BY NATURALIZATION.

### § 375.

Citizenship may be acquired after birth by naturalization. So, also, nationality may be changed, as the result of a shifting of sovereignty, without the acquisition of full rights of citizenship in the sense of the municipal law of the new sovereign. Again, in this sense, nationality and citizenship are not necessarily coextensive terms. A separate place will therefore be here given to naturalization, as affecting both nationality and citizenship.

## 3. BY REVOLUTION.

### § 376.

On the execution of the treaty of 1783, acknowledging the independence of the United States, all persons, whether born in the United States or otherwise, who adhered to the United States, were absolved from their allegiance to Great Britain, while those who adhered to Great Britain were British subjects.

*McIlvalne v. Coxe's Lessee*, 4 Cranch, 209.

See, also, *Dawson v. Godfrey*, 4 Cranch, 321; *Fairfax v. Hunter*, 7 Cranch, 603; *Blight v. Rochester*, 7 Wheat. 535; *Contee v. Godfrey*, 1 Cranch C. C. 479.

By an act of the 4th of October, 1776, the State of New Jersey asserted its right to the allegiance of all persons born and then residing within the territory of the State. Therefore, one who was born there, and continued to reside there till 1777, was a citizen of the State; and his leaving the State afterwards, and actually adhering to the side of the Crown, did not render him an alien, nor did the treaty of peace of 1783 have that effect.

*McIlvalne v. Coxe's Lessee*, 4 Cranch, 209.

"But it is insisted that the treaty of peace, operating upon his condition at that time, or afterwards, he became an alien to the State of New Jersey in consequence of his election then made to become a subject of the King, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression which, by any implication, could work this effect. It contains an acknowledgment of the Independence and sovereignty of the United



States in their political capacities, and a relinquishment on the part of His Britannic Majesty of all claim to the government, propriety and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period citizens of the United States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective States, who, in their sovereign capacities, had acted authoritatively upon the subject. It left all such persons in the situations it found them, neither making those citizens who had, by the laws of any of the States, been declared aliens, nor releasing from their allegiance any who had become, and were claimed as, citizens. It repeals no laws of any of the States which were then in force and operating upon this subject, but, on the contrary, it recognizes their validity by stipulating that Congress should recommend to the States the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were, at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the States, anterior to and independent of the treaty, but its indiscriminate adoption might be productive of more mischief than it is possible for us to foresee.

"If, then, at the period of the treaty, the laws of New Jersey, which had made Daniel Coxe a subject of that State, were in full force, and were not repealed or in any manner affected by that instrument; if by force of these laws he was incapable of throwing off his allegiance to the State and derived no right to do so by virtue of the treaty, it follows that he still retains the capacity, which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover." (Cushing, J., in *McIlvaine v. Coxe's Lessee*, 4 Cranch, 214, 215.)

Persons born in the colonies before the Declaration of Independence had a right to elect whether they would retain their native allegiance to the British Crown or would become citizens of one of the several States. The rule as to the point of time at which Americans, born before the Declaration of Independence, ceased to be British subjects differed in England and in the United States, England taking the treaty of peace in 1783; the United States, the date of the Declaration. It was not necessary that the election should have been manifested by any act prior to, or on or about, the 4th of July, 1776. Persons remaining here after that day were, *prima facie*, to be deemed American citizens, but this presumption was subject to rebuttal by showing adhesion to the British Crown during the struggle.

*Ingalls v. Trustees*, 3 Pet. 99.

See the case of *Andrew Allen, Moore. Int. Arbitrations*, I. 290.

A resident of New York, who, independently of any act of the legislature of the State which might affect his status, had elected to be an alien, was not made a citizen of the State by the resolution of the convention of New York of the 16th of July, 1776, "that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State;" he being then within the British lines and under the protection of the British army, manifesting a full determination to continue a British subject. But if he had ever owed any allegiance to the State, it was held that he would have been released from it by a subsequent bill of attainder by which he was declared to be forever banished from the State, and adjudged guilty of treason should he be found therein.

*Ingalls v. Trustees*, 3 Pet. 99.

See, as to the case of Bishop *Ingalls*, before the commission under Art. VI. of the Jay Treaty, Moore, Int. Arbitrations, I. 288.

An infant who was born in America before the Declaration of Independence and resided in New York with his father, a British partisan, during the subsequent conflict; and went with him to England shortly before the evacuation of the city by the British in November, 1783, and never returned, must be deemed to have followed the condition of his father and to have adhered to the Crown.

*Ingalls v. Trustees*, 3 Pet. 99.

"The doctrine of perpetual allegiance is not applied by the British courts to the American *ante nati*. This is fully shown by the late case of *Doe v. Acklam*, 2 Barn. & Cresw. 779. Chief Justice Abbott says: 'James Ludlow, the father of Frances May, the lessor of the plaintiff, was undoubtedly born a subject of Great Britain. He was born in a part of America which was at the time of his birth a British colony, and parcel of the dominions of the Crown of Great Britain; but, upon the fact found, we are of opinion that he was not a subject of the Crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognized by the Crown of Great Britain, after the colonies had become United States, and their inhabitants generally citizens of those States. And her father, by his continued residence in those States manifestly became a citizen of them.' He considered the treaty of peace as a release from their allegiance of all British subjects who remained there. A declaration, says he, that a state shall be free, sovereign, and independent, is a declaration that the people composing the state shall no longer be considered as subjects of the sovereign by whom such a declaration is made. And this court, in the case of *Blight's Lessee v. Rochester*, 7 Wheat. 544, adopted the same rule with respect to the

right of British subjects here: That although born before the Revolution they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. The British doctrine, therefore, is that the American *ante nati*, by remaining in America after the treaty of peace, lost their character of British subjects. And our doctrine is, that by withdrawing from this country and adhering to the British Government, they lost, or, perhaps more properly speaking, never acquired, the character of American citizens.

"This right of election must necessarily exist in all revolutions like ours, and is so well established by adjudged cases that it is entirely unnecessary to enter into an examination of the authorities. The only difficulty that can arise is to determine the time when the election should have been made. Vattel, b. 1, c. 3, § 33; 1 Dall. 58; 2 Dall. 234; 20 Johns. 332; 2 Mass. 179, 236, 244, n.; 2 Pickering, 394; 2 Kent's Com. 49.

"I am not aware of any case in the American courts where this right of election was denied, except that of *Ainsley v. Martin*, 9 Mass. 454. Chief Justice Parsons does there seem to recognize and apply the doctrine of perpetual allegiance in its fullest extent. He then declares that a person born in Massachusetts, and who, before the 4th of July, 1776, withdrew into the British dominions and never since returned into the United States was not an alien; that his allegiance to the King of Great Britain was founded on his birth within his dominions, and that that allegiance accrued to the Commonwealth of Massachusetts as his lawful successor. But he adds what may take the present case even out of his rule: 'It not being alleged,' says he, 'that the demandant has been expatriated by virtue of any statute or any judgment of law.' But the doctrine laid down in this case is certainly not that which prevailed in the supreme judicial court of Massachusetts both before and since that decision, as will appear by the cases above referred to of *Gardner v. Ward*, 2 Mass. 224, n., and *Kilham v. Ward*, 2 Mass. 236, and of *George Phipps*, 2 Pickering, 394, n."

Thompson, J., in *Inglis v. Trustees*, 3 Pet. 120 et seq.

"The American States [during the Revolutionary War] insisted upon the allegiance of all born within the States respectively, and Great Britain asserted an equally exclusive claim. The treaty of peace of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States were virtually absolved from all allegiance to the British Crown. All those who then adhered to the British Crown were deemed and held subjects of that Crown. The treaty of peace was

a treaty operating between the states on each side and the inhabitants thereof. In the language of the seventh article, it was a firm and perpetual peace between His Britannic Majesty and the said States, 'and between the subjects of the one and the citizens of the other.' Who were then subjects or citizens was to be decided by the state of facts. If they were originally subjects of Great Britain, and then adhered to her, and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects, but then adhering to the States, the treaty deemed them citizens. Such, I think, is the natural, and, indeed, almost necessary meaning of the treaty; it would otherwise follow that there would continue a double allegiance of many persons, an inconvenience which must have been foreseen, and would cause the most injurious effects to both nations. . . . It does not appear to us that her situation as a *feme covert* disabled her from a change of allegiance. British *femes covert*, residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens and to have been absolved from their antecedent British allegiance. The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. The case of *Martin v. The Commonwealth*, 1 Mass. Rep. 347, turned upon very different considerations. There the question was, whether a *feme covert* should be deemed to have forfeited her estate for an offense committed with her husband, by withdrawing from the State, &c., under the confiscation act of 1779; and it was held that she was not within the purview of the act. The same remark disposes of the case of *Sewell v. Lee*, 9 Mass. Rep. 363, where the court expressly refused to decide whether the wife, by her withdrawal with her husband, became an alien. But in *Kelly v. Harrison*, 2 Johns. Cas. 29, the reasoning of the court proceeds upon the supposition that the wife might have acquired the same citizenship with her husband, by withdrawing with him from the British dominions. See also *Bac. Abridg. Alien*, A; *Cro. Car.* 601, 602; 4 *Term. Rep.* 300; *Brook's Abr. Denizen*, 21; *Jackson v. Lunn*, 3 Johns. Cas. 109."

*Story, J.*, in *Shanks v. Dumont*, 3 Pet. 242, 247, 248.

By Art. II. of the Jay treaty, which provided for the withdrawal of the British forces from all places still held by them within the boundaries of the United States, it was stipulated that all settlers and

traders within such places might remain there, but should not be compelled to become citizens of the United States or to take any oath of allegiance to that Government; that they should, however, be at liberty to do so, and should "make and declare their election" within a year after the evacuation; and that if they remained after the expiration of the year, without having declared their intention of continuing to be British subjects, they should be "considered as having elected to become citizens of the United States." It was advised that, by so remaining, a British subject did not *ipso facto* become a citizen of the United States, but could become so only by naturalization in accordance with sec. 2 of the act of Jan. 29, 1795, 1 Stat. 414.

Wirt, At-Gen., 1819, 5 Op. 716, Appendix.

"The foreigners, therefore, who, during the existence of the Articles of Confederation, became inhabitants, or, taking the expression in its most limited sense, were admitted citizens of any State, became thereby entitled to the privileges of citizens in the several States, and were, to all intents and purposes, citizens of the United States at the time of the adoption of the Constitution of the United States. The contrary opinion would lead to the extraordinary conclusion that the several thousand foreigners naturalized under the laws of the States prior to the adoption of the Constitution of the United States, not being then deemed citizens of the United States, would be forever ineligible, whilst those naturalized under the acts of Congress subsequent to the adoption of the Constitution would, as citizens of the United States, become eligible to either House of Congress."

Mr. Gallatin to Mr. Lowrie, Feb. 19, 1824, 2 Gallatin's Writings, 287.

Under the constitution of Texas of 1836, which identified as citizens only those who resided there on the day of the declaration of independence or who should be naturalized, and which provided that no alien should hold land in Texas except by titles emanating from the Government, and under the act of 1840 adopting the common law of England, one who removed from Texas to Mexico during the revolution and before the declaration of independence, and remained in Mexico, is an alien, and can not inherit in Texas.

McKinney v. Saviego, 18 How. 235.

As to the terms of naturalization in Texas, see Moore, Int. Arbitrations, III. 2541.

Where a person, born in Texas when it was a part of the Republic of Mexico, the place of birth being also the domicil of her father and mother until their deaths, was removed to Mexico at the age of four years, before the declaration of Texan independence, and there remained, it was held that she was an alien, and could sue in the courts of the United States.

Jones v. McMasters, 20 How. 8.

While, by Art. IX. of the treaty of peace between the United States and Spain, Dec. 10, 1898, it was declared that Congress should determine the civil rights and political status of the native inhabitants of the territories ceded to the United States, nothing was said as to the status of the native inhabitants of Cuba, which was to be occupied by the United States only provisionally. As Spain relinquished her sovereignty over the island, such inhabitants ceased to be subjects of Spain, but they did not immediately gain another definite status. Under these circumstances it was held that during the American occupation they might, while "temporarily sojourning" in a foreign country, be "protected through the exercise of good offices by the representatives of the United States in case of need upon due establishment of their nativity and of their merely temporary absence from Cuba and intention to return to and permanently reside in that island." The diplomatic and consular officers of the United States were therefore authorized to register in their offices the names of native inhabitants of Cuba who might be temporarily sojourning within their jurisdiction, and to exercise their good offices for such as might seek protection for well-established cause, it appearing that they had not lost the quality of native inhabitants of Cuba by naturalization in any other country or by assuming therein obligations inconsistent with their original allegiance.

Mr. Hay, Sec. of State, to the diplomatic and consular officers of the United States, circular, May 2, 1899, For. Rel. 1900, 894.

This circular applied to Cubans in Spain. (Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, No. 182, June 4, 1900, 23 MS. Inst. Spain, 28.)

The statutes of the United States permit, but do not require, American consuls to administer oaths, take acknowledgments, and do other notarial acts for the "legalization" of documents; but it was not competent for the Government of the United States, by order or declaration, to require documents drawn in foreign countries for use in Cuba to be legalized before an American diplomatic or consular representative. (Mr. Hay, Sec. of State, to Sec. of War, March 16, 1899, 235 MS. Dom. Let. 490.)

The circular of May 2, 1899, did not apply to minor children who, although they were natives of Cuba, resided with their parents in Spain, where the latter were apparently domiciled. (Mr. Adee, Act. Sec. of State, to Mr. Storer, No. 51, Aug. 12, 1899, 22 MS. Inst. Spain, 607. See also, Mr. Adee, Act. Sec. of State, to Mr. Storer, min. to Spain, No. 54, Aug. 18, 1899, 22 MS. Inst. Spain, 609, enclosing copy of Department's No. 16, Aug. 18, 1899, to Mr. Lay, consul-general at Barcelona, in reply to the latter's No. 18 bis, July 26, 1899.)

Moreover, the circular, as its title indicates, was intended to cover only *native* inhabitants of the territory ceded or relinquished. So far as concerned children born abroad to natives of Cuba prior to April 11, 1899, the date of the exchange of ratifications of the treaty of peace, it was intimated that they "might very justly be held to be Spanish subjects," while it "might be proper to extend the provisions of the circular so as to include children of native Cubans born abroad after

April 11, 1899; " but the Department was of opinion that, instead of enlarging the terms of the circular, " it would be more prudent to take up and decide in each individual case whether the person is entitled to protection." (Mr. Hay, Sec. of State, to Sec. of War, Dec. 28, 1900, 250 MS. Dom. Let. 13.)

An inquiry having been made in May, 1900, as to what steps, if any, could be taken by a citizen and resident of Venezuela to preserve the original or the Cuban nationality of a child, a native of Cuba, whom he had adopted eight years previously, the Department of State replied that the question would be " one for the determination of the Cuban authorities when a definitive government shall be established in Cuba."

Mr. Hay, Sec. of State, to Mr. Loomis, min. to Venezuela, June 8, 1900, For. Rel. 1900, 954.

The capture of Charleston, S. C., by the British forces in May, 1780, did not permanently change the allegiance or the national character of the inhabitants. (Shanks v. Dupont, 3 Pet. 242.)

In reply to an inquiry whether in case of " trouble " in Caracas Cubans might hoist the United States flag for protection, the Department of State said: " Flag should only be shown by citizens. You may notify authorities of any menaced Cuban property and use good offices for them."

Mr. Adee, Acting Sec. of State, to Mr. Russell, chargé at Caracas, tel., Sept. 19, 1899, For. Rel. 1899, 796.

Benito Llaveria y Pascual was born in Havana, Cuba, June 24, 1875, his parents being natives of the province of Tarragona. In 1895 he went to Barcelona, Spain, where his father had resided for three years. In March, 1898, he was conscripted. He applied for exemption, on the ground that he and his father were only temporarily residing in Barcelona. This application was denied; and it was held, besides, that he had incurred certain penalties by his failure previously to be enrolled on first becoming liable to service. He failed, however, to report, and on April 1, 1898, returned to Havana. In June, 1899, he returned to Spain, bearing a Cuban passport issued by the United States military authorities and a certificate of identity and residence issued by the municipal authorities of Havana; and with these papers he was registered in the United States consulate-general at Barcelona as a Cuban citizen. In January, 1901, he was again drawn for duty, and his petition for exemption was rejected, the military authorities holding that, even assuming that he had lost his Spanish nationality, he was obliged to fulfill the obligation of service previously incurred. This conclusion appearing to be in accordance with the Spanish law, it was accepted by the United States.

Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, April 8 and June 4, 1901, For. Rel. 1901, 469, 470.

In the instruction of April 8, Mr. Hay said: "If, under the Spanish law, Mr. Llaveria was liable to military service when he was enrolled in March, 1898, the Department is inclined to think that the Spanish view is correct. A subsequent change of nationality would not operate to discharge the obligation. You may examine this question. The Department's circular of May 2, 1899, only authorizes our diplomatic and consular officers to exercise good offices for the protection of 'native inhabitants of Cuba temporarily residing abroad.' The consul at Barcelona has protested against the action of the Spanish authorities in this case. The Department will therefore take no further action on it until it shall have received a report from you on the point above referred to." (For. Rel. 1901, 469.)

Mr. Storer having reported that the conclusion of the military authorities appeared to be in conformity with the Spanish law, Mr. Hay, in his instruction of June 4, said: "You state that you have reached the conclusion that Mr. Benito Llaveria Pascual was by Spanish law domiciled in Barcelona at the time of his enrollment for the army in 1898; that he was of proper age to be enrolled, and that his failure to present himself for such purpose places him entirely under the penal sections cited by the commission. You add that you have advised the United States consul-general at Barcelona of your conclusions. In reply I have to say that the Department approves your action." (For. Rel. 1901, 470.)

Congress having declared by resolution that the people of the island of Cuba "are and of right ought to be free and independent," and the status of the island in this regard not having been changed by the treaty with Spain of December 10, 1898, a citizen of Cuba is a citizen of a foreign state, within the act of Congress of 1887 giving the circuit court of the United States jurisdiction of controversies "between citizens of a State and foreign states, citizens, or subjects."

*Betancourt v. Mutual Reserve Fund Life Association*, 101 Fed. Rep. 305.

### III. NATURALIZATION.

#### 1. LEGISLATIVE AND CONVENTIONAL REGULATION.

#### § 377.

Beginning with the act of March 26, 1790, 1 Stat. 103, Congress, in the exercise of its power to establish an uniform rule of naturalization, has passed various statutes for the admission of aliens to citizenship of the United States. References to these statutes are given below. Recommendations for their amendment have from time to time been made. See, in this relation, the report of Messrs. Purdy, Hunt, and Campbell to the President, under Executive order of March 1, 1905, on the subject of naturalization and needed amendments of the law. (H. Doc. 46, 59 Cong. 1 sess.)



Naturalization has also been regulated to some extent by treaty. The United States has concluded treaties on the subject with the following countries: North German Union, Feb. 22, 1868; Bavaria, May 26, 1868; Baden, July 19, 1868; Hesse, Aug. 1, 1868; Belgium, Nov. 16, 1868; Sweden and Norway, May 26, 1869; Great Britain, May 13, 1870; Austria-Hungary, Sept. 20, 1870; Ecuador, May 6, 1872; Denmark, July 20, 1872; Hayti, March 22, 1902.

Although a fraudulent certificate of naturalization may be taken up by a diplomatic representative of the United States and sent to the Department of State, yet "the record of the court in which the fraudulent naturalization occurred remains, and duplicate certificates are readily obtainable . . . I earnestly recommend further legislation to punish fraudulent naturalization and to secure the ready cancellation of the record of every naturalization made in fraud."

President Grant, annual message, Dec. 7, 1874, For. Rel. 1874, xl.

The revision of the naturalization laws, especially so as to prevent frauds, is strongly recommended by President Roosevelt in his annual message of Dec. 6, 1904.

See, also, his special message of Dec. 5, 1905, transmitting to Congress the report of the Commission on Naturalization (Messrs. Purdy, Hunt, and Campbell) of Nov. 8, 1905, with drafts of bills on the subject. (H. Doc. 46, 59 Cong. 1 sess.)

"The numbers of persons of foreign birth seeking a home in the United States, the ease and facility with which the honest emigrant may after the lapse of a reasonable time become possessed of all the privileges of citizenship of the United States, and the frequent occasions which induce such adopted citizens to return to the country of their birth, render the subject of naturalization and the safeguards which experience has proved necessary for the protection of the honest naturalized citizen of paramount importance. The very simplicity in the requirements of law on this question affords opportunity for fraud, and the want of uniformity in the proceedings and records of the various courts, and in the forms of the certificates of naturalization issued, affords a constant source of difficulty.

"I suggest no additional requirements to the acquisition of citizenship beyond those now existing, but I invite the earnest attention of Congress to the necessity and wisdom of some provisions regarding uniformity in the records and certificates, and providing against the frauds which frequently take place, and for the vacating of a record of naturalization obtained in fraud.

"These provisions are needed in aid and for the protection of the honest citizen of foreign birth, and for the want of which he is made to suffer not infrequently. The United States has insisted upon the right of expatriation, and has obtained after a long struggle an

admission of the principle contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted governing such cases and providing how expatriation may be accomplished.

“While emigrants in large numbers become citizens of the United States, it is also true that persons, both native-born and naturalized, once citizens of the United States, either by formal acts or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these questions.”

President Grant, annual message, Dec. 5, 1876, For. Rel. 1876, ix.

“Our existing naturalization laws also need revision. Those sections relating to persons residing within the limits of the United States in 1795 and 1798 have now only a historical interest. Section 2172, recognizing the citizenship of the children of naturalized parents, is ambiguous in its terms and partly obsolete. There are special provisions of law favoring the naturalization of those who serve in the Army or in merchant vessels, while no similar privileges are granted those who serve in the Navy or the Marine Corps.

“‘An uniform rule of naturalization,’ such as the Constitution contemplates, should, among other things, clearly define the status of persons born within the United States subject to a foreign power (section 1992) and of minor children of fathers who have declared their intention to become citizens but have failed to perfect their naturalization. It might be wise to provide for a central bureau of registry, wherein should be filed authenticated transcripts of every record of naturalization in the several Federal and State courts, and to make provision also for the vacation or cancellation of such record in cases where fraud had been practiced upon the court by the applicant himself or where he had renounced or forfeited his acquired citizenship. A just and uniform law in this respect would strengthen the hands of the Government in protecting its citizens abroad, and would pave the way for the conclusion of treaties of naturalization with foreign countries.”

President Arthur, annual message, Dec. 1, 1884, For. Rel. 1884, x.

“The inadequacy of existing legislation touching citizenship and naturalization demands your consideration. While recognizing the right of expatriation, no statutory provision exists providing means

for renouncing citizenship by an American citizen, native-born or naturalized, nor for terminating and vacating an improper acquisition of citizenship. Even a fraudulent decree of naturalization cannot now be canceled. The privilege and franchise of American citizenship should be granted with care, and extended to those only who intend in good faith to assume its duties and responsibilities when attaining its privileges and benefits; it should be withheld from those who merely go through the forms of naturalization with the intent of escaping the duties of their original allegiance without taking upon themselves those of their new status, or who may acquire the rights of American citizenship for no other than a hostile purpose towards their original governments. These evils have had many flagrant illustrations. I regard with favor the suggestion put forth by one of my predecessors, that provision be made for a central bureau of record of the decrees of naturalization granted by the various courts throughout the United States now invested with that power."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xv.

"I renew the recommendation of my last annual message, that existing legislation concerning citizenship and naturalization be revised. We have treaties with many states providing for the renunciation of citizenship by naturalized aliens, but no statute is found to give effect to such engagements, nor any which provides a needed central bureau for the registration of naturalized citizens." (President Cleveland, annual message, Dec. 6, 1886, For. Rel. 1886, xl.)

"With the rapid increase of immigration to our shores and the facilities of modern travel, abuses of the generous privileges afforded by our naturalization laws call for their careful revision.

"The easy and unguarded manner in which certificates of American citizenship can now be obtained has induced a class, unfortunately large, to avail themselves of the opportunity to become absolved from allegiance to their native land and yet by a foreign residence to escape any just duty and contribution of service to the country of their proposed adoption. Thus, while evading the duties of citizenship to the United States they may make prompt claim for its national protection and demand its intervention in their behalf. International complications of a serious nature arise, and the correspondence of the State Department discloses the great number and complexity of the questions which have been raised.

"Our laws regulating the issue of passports should be carefully revised, and the institution of a central bureau of registration at the capital is again strongly recommended. By this means full particulars of each case of naturalization in the United States would be secured and properly indexed and recorded, and thus many cases of spurious citizenship would be detected and unjust responsibilities would be avoided."

President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xvii-xviii.

"Our naturalization laws should be so revised as to make the inquiry into the moral character and good disposition towards our Government of the persons applying for citizenship more thorough. This can only be done by taking fuller control of the examination, by fixing the times for hearing such applications, and by requiring the presence of some one who shall represent the Government in the inquiry. Those who are the avowed enemies of social order, or who come to our shores to swell the injurious influence and to extend the evil practices of any association that defies our laws, should not only be denied citizenship but a domicile."

President Harrison, annual message, Dec. 3, 1889, For. Rel. 1889, xvi.

"I beg to renew my recommendation that the laws be so amended as to require a more full and searching inquiry into all the facts necessary to naturalization before any certificates are granted. It certainly is not too much to require that an application for American citizenship shall be heard with as much care and recorded with as much formality as are given to cases involving the pettiest property right." (President Harrison, annual message, Dec. 1, 1890, For. Rel. 1890, xiii.)

See *infra*, § 384.

"Another consideration of cognate character presents itself. In the absence of a naturalization convention, some few states hold self-expatriation without the previous consent of the sovereign to be punishable, or to entail consequences indistinguishable from banishment. Turkey, for instance, only tacitly assents to the expatriation of Ottoman subjects so long as they remain outside Turkish jurisdiction. Should they return thereto their acquired alienship is ignored. Should they seek to cure the matter by asking permission to be naturalized abroad, consent is coupled with the condition of non-return to Turkey. It is the object of a naturalization convention to remedy this feature by placing the naturalized alien on a parity with the natural-born citizen and according him due recognition as such."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, No. 14, July 17, 1902, For. Rel. 1902, 910, 911.

"The Government of the United States regards the conclusion of conventions of this character [naturalization conventions] as of the highest value, because not only establishing and recognizing the right of the citizens of the foreign state to expatriate themselves voluntarily and acquire the citizenship of this country, but also because establishing beyond the pale of doubt the absolute equality of such naturalized persons with native citizens of the United States in all that concerns their relation to or intercourse with the country of their former allegiance. . . .

"In some instances other governments, taking a less broad view, regard the rights of intercourse of alien citizens as not extending to their former subjects who may have acquired another nationality. So far as this position is founded on national sovereignty and asserts a claim to the allegiance and service of the subject not to be extinguished save by the consent of the sovereign, it finds precedent and warrant which it is immaterial to the purpose of this instruction to discuss. Where such a claim exists, it becomes the province of a naturalization convention to adjust it on a ground of common advantage, substituting the general sanction of treaty for the individual permission of expatriation and recognizing the subject who may have changed allegiance as being on the same plane with the natural or native citizens of the other contracting state."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, No. 14, July 17, 1902, For. Rel. 1902, 910.

In the negotiation of a naturalization treaty, no clause could be admitted that implied assent to the imposition by the country of origin upon any class of persons, by reason of their creed, of "such legal disability . . . as may impair their interests in that country or operate to deny them the judicial remedies there which all American citizens may justly claim in accordance with the law and comity of nations."

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, No. 14, July 17, 1902, For. Rel. 1902, 910, 914.

In the negotiation of a naturalization treaty no clause could be admitted that implied an obligation to receive and convert into citizens persons falling within any of the categories of prohibited immigrants.

Mr. Hay, Sec. of State, to Mr. Wilson, min. to Roumania, No. 14, July 17, 1902, For. Rel. 1902, 910, 914.

## 2. VOLUNTARY INDIVIDUAL ACTION.

### § 378.

July 31, 1840, the Peruvian Government issued to the prefects and to the superior courts of justice a circular order, saying: "The 168th article of the Constitution provides that foreigners who acquire real estate are *ipso facto* naturalized." The clerks were therefore forbidden to draw up any instrument for the alienation of the right and title or the usufruct of any lands or real estate to any foreigner, without inserting an express renunciation of his foreign citizenship, as well as an express submission, as a nat-

uralized Peruvian, to the laws of the country. Besides, wherever, either judicially or extrajudicially, a foreigner, in consequence of a lien or mortgage, acquired an interest in real estate, the official drawing up the sentence or instrument was required to insert like clauses.

Mr. Pickett, chargé d'affaires of the United States at Lima, protested against the order, on the ground that, while aliens might be prevented from holding real estate, to treat them as citizens merely because they had bought it was to lay a snare for them. The Peruvian Government defended its action, but afterwards stated that the order would not be construed to operate retroactively. With reference to this concession Mr. Pickett expressed the opinion that the measure would be "abandoned piecemeal" until it became "unobjectionable" or a "dead letter," though it might not be formally repealed.

Mr. Pickett to Mr. Forsyth, Sec. of State, No. 19, Aug. 10, 1840; No. 35, Feb. 17, 1841, 5 MS. Desp. from Peru; Mr. Pickett to Mr. Webster, No. 51, Nov. 12, 1841, 6 MS. Desp. from Peru.

"These and other parts of the proclamation [of October 21, 1817] exhibit very clearly its intent that there was no dis-

Mr. Webster's  
opinion on domicilia-  
tion.

position on the part of the Spanish authorities to exercise the power of forcibly domiciliating foreigners, even if such power were not contrary to all natural law. . . . Change of allegiance, which is manifested by the voluntary action and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect. It is certainly just that acts which are to be regarded as changing the allegiance of American citizens should be distinctly understood by those to whom they are applied as having that effect; that the practical as well as the theoretical construction of such acts should be unequivocal and uniform, and that no acts should be deemed acts of expatriation except such as are openly avowed and fully understood."

Mr. Webster, Sec. of State, to Mr. Sharkey, consul at Havana, July 5, 1852, Moore, Int. Arbitrations, III. 2701, 2702, 2703.

See, however, Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, July 20, 1863, Dip. Cor., 1863, I. 684, quoted *infra*, § 495.

A law by a foreign state providing that all persons visiting such state are to be regarded as citizens or subjects will not be regarded as internationally binding.

Mr. Fish, Sec. of State, to Mr. Russell, min. to Venezuela, Feb. 22, 1875, MS. Inst. Venez. II. 283.

See, to the same effect, Black, At. Gen., 1859, 9 Op. 356.

The question of citizenship will not be determined *ex parte* on the application of a foreign government. (Mr. Bayard, Sec. of State, to Col. Frey, Swiss min., May 20, 1887, MS. Notes to Switz. I. 158.)

The constitution of Mexico, of 1857, Title I., sec. 2, art. 30, provides:

“They are Mexicans: . . . III. Foreigners who  
 Question as to acquire real estate in the Republic, or have Mexican  
 Mexican law. children; Provided, always, they do not manifest

their resolution to preserve their nationality.” Various cases involving the interpretation and effect of this provision came before the mixed commission under the convention between the United States and Mexico, of July 4, 1868. The best known of these cases was that of Fayette Anderson and William Thompson, citizens of the United States, who made a claim against the Mexican Government on account of acts committed in 1867. It appeared that in 1863 they went to Mexico and bought land. The case was referred to the umpire, Dr. Lieber, who said: “This law clearly means to confer a benefit upon the foreign purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case), merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred remaining American citizens, as they were by birth—one of the very strongest of all ties. . . . The umpire . . . decides that they were citizens of the United States, and that they have a full right, under the convention, to present their claims to the joint United States and Mexican Commission.”

Moore, *Int. Arbitrations*, III. 2479-2481.

Sir Edward Thornton, who succeeded Dr. Lieber as umpire, followed the same rule of decision in such cases. (Id. 2481-2482.)

See the argument of Mr. Ashton, agent and counsel of the United States, on the above-cited provision of the Mexican constitution, and also his reference to the decree of President Comonfort, of February 1, 1856. (Id. 2468-2477.)

By the law of February 1, 1856, article 8, it is provided that aliens who have acquired real property in Mexico may become citizens of the Republic by making a declaration of their wish to be naturalized before the civil authorities of the place of their residence, and that, on the presentation of this declaration at the ministry of foreign affairs, accompanied with a proper petition, “their letter of citizenship shall be issued to them.”

Chapter I., article 1, section 10, of the law of May 28, 1886, concerning alienage and naturalization, declares to be Mexicans “aliens acquiring real estate in the Republic, provided they do not declare their intention of retaining their nationality.” By the same section the alien is required at the time of acquiring the property to declare “to the officiating notary or judge whether he does or does not wish to acquire the Mexican nationality granted him by section 3 of article 30 of the constitution,” and his decision on the point is required to appear in the document.

By Chapter III., article 19, it is provided that aliens who come within section 10 may petition the department of foreign relations for their certificate of naturalization within the time allowed for that purpose, namely, one year, and they are required to annex to their petition a document proving that they have acquired the real estate.

By Chapter III., sections 14 and 16, the petitioner is required in the course of the process to renounce all submission, obedience and fealty to every foreign government, and especially to that of which he was a subject.

For. Rel. 1895, II. 1013, 1015.

“The attention of the Department has recently been drawn to a ‘Notice to Americans’ published by the legation of the United States in Mexico, in August last, and of which the following is a copy:

“‘Americans are hereby notified that, in conformity with Article I., Chapter V., of the Law of Foreigners of June, 1886, foreigners who may have acquired real estate or have had children born to them within (the) Republic will be considered by the Mexican Government as Mexican citizens, unless they officially declare their intention to retain their own nationality and to that effect obtain from the department of foreign affairs a certificate of nationality on or before December 4, 1886.

“‘Said certificates may be obtained for Americans through the legation of the United States, in this city. Applications for same must be accompanied by one dollar for the necessary revenue stamps.

“‘(Signed): Legation of the United States, Mexico, August 20, 1886.’

“A copy and a translation of the law in question were transmitted to the Department in Mr. Jackson’s No. 241, of the 21st of June last, but as the dispatch contained copies and translations of other Mexican laws, to which specific references were made for the Department’s guidance, the provisions of Article I. of Chapter V. of the Law of Foreigners, to which no reference was made, were overlooked, until the notice above quoted, which was not submitted nor communicated to the Department, was subsequently and only incidentally brought to its attention. A comparison of the notice with the law shows that there are certain provisions of the latter to which the notice does not refer; but they do not in any way tend to remove, but rather to increase, the dissent of this Government from the position of Mexico as disclosed in the notice. The law in question, having been adopted for the purpose of denationalizing certain classes of foreigners in that country, unless they take some affirmative action to preserve their nationality, contains a principle which this Government is compelled to regard as inadmissible.



"The United States, while claiming for aliens within its jurisdiction, and freely conceding to its citizens in other jurisdictions, the right of expatriation, has always maintained that the transfer of allegiance must be by a distinctly voluntary act, and that the loss of citizenship cannot be imposed as a penalty nor a new national status forced as a favor by one government upon a citizen of another.

"Not only is this believed to be the generally recognized rule of international law, but it is pertinent to notice that it was accepted and acted upon by the mixed commission under the convention of July 4, 1868, between the United States and Mexico. The first umpire of that commission, Dr. Francis Lieber, held, and the commissioners subsequently followed his decision, that a law of Mexico declaring every purchaser of land in that country a Mexican citizen unless he expressed a desire not to become so, did not operate to change, against their will, the national status of citizens of the United States who had purchased land in Mexico, but who had omitted in so doing to disclaim an intention to transfer their allegiance.

"The notice in question is not interpreted by the Department as an admission by the legation of the defensibleness, on generally accepted principles of international intercourse, of legislative decrees changing the national status of foreigners without their consent. Americans are notified that, unless they do certain things, they 'will be considered by the Mexican Government as Mexican citizens.' This, it is to be observed, does not assert or imply that the legation acceded to the Mexican position. But in order to avoid any question of this kind hereafter you will take occasion to make known to the Mexican Government that this Department does not regard the publication of the notice above referred to as admitting the doctrine of involuntary change of allegiance, or that the same can be held conclusive upon our citizens; and that this Government is constrained to withhold its assent from that doctrine, as embodied in Article I., Chapter V., of the law referred to."

Mr. Bayard, Sec. of State, to Mr. Manning, min. to Mexico, Nov. 20, 1886.  
For. Rel. 1886, 723.

The views set forth in the foregoing instruction were duly communicated to the Mexican Government. (Mr. Manning, Am. min., to Mr. Mariscal, min. of for. aff., Nov. 30, 1886, For. Rel. 1887, 672.)

The Mexican Government declined to discuss "the right which Mexico has to issue laws that emanate directly from the provisions of its constitution, unless some practical case arises to give occasion to such debate." (Mr. Mariscal to Mr. Manning, Dec. 1, 1886, For. Rel., 1887, 678.)

See, also, Mr. Manning to Mr. Bayard, Dec. 11, 1886, and Mr. Bayard to Mr. Manning, Jan. 18, 1887, For. Rel. 1887, 681, 684.

By an act of the Mexican Congress of May 30, 1887, the time designated in Art. I., Chap. V., of the law of May 28, 1886, for making the decla-

ration with regard to nationality, was extended for eight months. (Mr. Manning to Mr. Bayard, April 15 and June 7, 1887, For. Rel. 1887, 712, 731.)

Mr. Bayard, while expressing appreciation of the disposition shown by the Mexican Government to afford to all who desired to do so an opportunity to make the prescribed regulation, still expressed "dissent from the position that foreigners who have purchased land or had children born to them in Mexico may, from time to time, by a municipal statute, be deprived of their nationality unless they take some affirmative step to preserve it." (Mr. Bayard to Mr. Manning, April 27, 1887; Mr. Manning to Mr. Mariscal, June 7, 1887, For. Rel. 1887, 717, 732-733.)

See, in the same sense, Mr. Bayard, Sec. of State, to Mr. Whitehouse, chargé, Nov. 14, 1888, MS. Inst. Mexico XXII, 300.

In 1895, the Mexican Government declined to extradite Chester W. Rowe, a fugitive from the justice of the United States, on the ground that he had acquired Mexican nationality by the purchase of real estate. Circumstances indicated that Rowe had sought Mexican nationality in this manner after he had taken refuge in Mexico, with a view to secure protection against the demand for his extradition. On this ground the United States raised the question whether his naturalization was valid, and expressed a desire that this question should be judicially determined. The Mexican Government disclaimed the power to institute judicial proceedings on its own motion for this purpose, but stated that the Mexican courts would be prepared to pass upon the question if the United States should institute proceedings. In the course of the diplomatic discussions, the Department of State of the United States said: "It is not within the province or intent of this Department to find fault with the laws of Mexico, nor to deny the effect attributed to them by Mr. Mariscal in this case."

Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mexico, Dec. 13, 1895, For. Rel. 1895, II. 1008.

The Mexican laws concerning naturalization and the law under which foreigners, by acquiring real estate in the Republic, are invested with Mexican nationality, may be found in For. Rel. 1895, II. 1011-1018. See, also, Mr. Olney, Sec. of State, to Mr. Ransom, min. to Mexico, No. 123, Nov. 22, 1895, MS. Inst. Mex. XXIV. 21.

February 19, 1890, Mr. Blaine, in an instruction to the minister of the United States at Rio de Janeiro, stated that attention had been attracted to a decree of the provisional government of December 15, 1889, the first article of which declared that all foreigners who were residing in Brazil on November 15, 1889, the date of the advent of the Republic, would be considered as Brazilian citizens, unless within six months from the publication of the decree they should make a declaration to

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Brazil.

the contrary before the proper authorities of the municipalities in which they respectively were domiciled; while, by the second article of the decree, it was declared that all foreigners who should thereafter reside in the country for ten years should be considered as Brazilian citizens, unless they made the declaration provided for in the first article. Mr. Blaine stated that the principle of the decree was not entirely novel, but that it was not known to have been accepted by foreign governments when brought to their attention. In this relation he referred to the Mexican law of 1886 and to the representations made by the United States with regard to it. To hold that the mere residence of an individual in a foreign country was conclusive evidence of his desire and intention to become one of its citizens would, declared Mr. Blaine, involve an assumption of a most violent character. In a matter of such vital importance as that of citizenship it was, he said, necessary to preserve fundamental principles, and especially was this so in the case of commercial nations into whose territory foreigners came to reside for purposes of lawful enterprise, wholly disconnected from any desire to participate in political affairs. It was scarcely compatible with this beneficial state of intercourse to attribute to such persons political aspirations and compel them to make a disclaimer in order to preserve their nationality. For these reasons the United States was unable, said Mr. Blaine, to concede that the decree in question might have the effect of denationalizing citizens of the United States residing in Brazil.

In consequence of communications made at Washington, the legation at Rio de Janeiro was directed not to present the foregoing instructions to the Brazilian Government till further advised.

In a circular of May 23, 1890, the Brazilian ministry of foreign affairs stated that the provisional government had no intention of imposing Brazilian citizenship on the foreigners to whom the decree referred, but that to some governments, and especially to the French Republic, it had seemed that this was the case. The French Government had therefore asked (1) what would be the opinion of the provisional government if a Frenchman should insist that, as he had not made the necessary declaration before the 15th of June, he did not cease to be a French citizen, and (2) what would the provisional government think of the case of a Frenchman who, after taking advantage of the decree, should return to France and seek the assistance of the Brazilian legation to protect him against a charge of desertion. The ministry of foreign affairs said it had answered the first question by stating that the decree was intended to admit into the Brazilian communion all who desired to enter it without any constraint, and that if a Frenchman who had not taken advantage of the privileges allowed by the decree insisted on not being naturalized, his protest would be respected. To the second inquiry, the ministry

of foreign affairs replied that the Brazilian legation would not protest against the decision of the French Government in the case mentioned. The ministry of foreign affairs also stated that by a decree of May 15, 1890, the Government allowed the declaration to be made, not only before the municipal chambers, but also before notaries public and before the diplomatic or consular representative of the interested party, and that the Government would also grant an extension of the time allowed for making it.

In view of these statements as to the interpretation and enforcement of the decree, the legation of the United States was instructed September 5, 1890, that the Department of State, while entertaining no doubt as to the correctness of the principles previously enunciated by it, was of opinion that it would be advisable for citizens of the United States to make the desired declaration before the American diplomatic or consular officers. Other governments, said the Department, were known to have advised their citizens to take this course, which seemed to be dictated by a just consideration for their convenience and security. At the same time, the legation, in acquainting the Brazilian Government with the nature of these instructions, was to add that, although the Government of the United States had counselled its citizens to make the declaration, it could not admit that a failure to make it prevented such citizens from appealing to their Government in case of necessity, or estopped that Government from affording them relief and protection.

October 21, 1890, the American legation issued an instruction to the consular officers of the United States in Brazil to receive the declarations of citizens of the United States, and on the 24th of the same month the legation made a communication on the subject to the ministry of foreign affairs.

In a memorandum presented to the Department of State, October 9, 1890, the Brazilian legation at Washington, after referring to the provisions in the codes of various nations, under which, particularly in cases of double allegiance, the election of nationality may be inferred from the silence of the individual, said: "The Brazilian decree does not impose nationality, and the Government has given all facilities for its execution. It has been made known that any claim presented through diplomatic or consular agency would be favorably received if the claimant had not enjoyed any of the rights granted; that the declaration required in the decree can be made either before the municipal and police authorities or before the diplomatic or consular agent of the respective nation; that the term for the declaration [has been] enlarged up to the 31st of December, 1890; and, finally, the constitution, which has just been issued, extends still more that term, allowing six months to be reckoned from the date of the execution of the constitution. From these considera-

tions it follows: (1) That the provisional government have exercised their right and have not gone beyond it. (2) That their nationality having not been made compulsory on foreigners residing in the Republic, they do not violate the latter's rights nor cause them any loss. (3) That the protest of the Italian Government has no foundation. (4) That the claim that the decree be revoked or modified is contrary to the sovereignty and dignity of Brazil. The Government of Brazil therefore is bound not to accede to that claim."

Mr. Blaine, Sec. of State, to Mr. Adams, min. to Brazil, Jan. 7, Feb. 19, March 6, and March 22, 1890, MS. Inst. Brazil, XVII. 427, 441, 452, 457; Mr. Lee, chargé, to Mr. Blaine, Sec. of State, May 9, and May 27, 1890, 49 MS. Desp. Brazil; Mr. Blaine, Sec. of State, to Mr. Lee, chargé, June 3, 1890, MS. Inst. Brazil, XVII. 461; Mr. Wharton, Act. Sec. of State, to Mr. Lee, chargé, Sept. 5, 1890, id. 473; Mr. Lee, chargé, to Mr. Blaine, Sec. of State, Oct. 24, 1890, 50 MS. Desp. Brazil; Mr. Blaine, Sec. of State, to Mr. Conger, min. to Brazil, Dec. 3, 1890, MS. Inst. Brazil, XVII. 490, enclosing copy of a memorandum by Mr. Valente, Brazilian min., Oct. 9, 1890, and a "reply of Mr. Blaine, of Dec. 2, 1890." The "reply" of Mr. Blaine does not appear, however, to have been sent to Mr. Valente. An endorsement on Mr. Valente's memorandum, "ans'd Dec. 2, 1890," is crossed out, indicating that the answer was written, but was at the last moment withheld. A copy probably was transmitted to Mr. Conger, in accordance with a direction previously given and by oversight not afterwards countermanded. See, in this relation, Mr. Blaine, Sec. of State, to Mr. Mendonça, Brazilian min., Nov. 4, 1890, enclosing copy of Mr. Blaine's instruction to Mr. Adams, of Feb. 19, 1890, the delivery of which was "by request" withheld from the Brazilian Government, and stating that "all further consideration of the subject" would at Mr. Mendonça's "earnest request" be postponed till after the latter's return from a journey which he was about to make to Rio de Janeiro. (MS. Notes to Brazil, VII. 91.)

March 26, 1860, the Haytian Government issued an invitation to "all men of African origin who are willing to share our fortunes" to purchase land and settle in that country. It was stated that permission would be granted to immigrants to buy land on their making a declaration that they wished to become Haytians, and on their renouncing every other nationality. It was stated that any of the immigrants destined to a religious career would be exempt from military service, but that no exception would be made in the case of those who were engaged in secular pursuits. All immigrants who complied with the conditions were, after a settlement of a year and a day in the Republic, to enjoy all the privileges of Haytian citizens. This invitation was accepted by various persons in the United States, who went to Hayti and obtained grants of land thereunder, upon their becoming citizens. On the subsequent claim of some of these persons to exemp-

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immigrants.

tion as citizens of the United States from military service, the Department of State said: "As the immigration of the persons in question and the acceptance by them of a land grant from the Haytian Government appears to have been expressly conditioned upon their becoming citizens of Hayti, the transaction must be regarded as a voluntary contract whereby the immigrant settler renounced his American citizenship and became merged in the body politic of the Haytian Republic. You will test each individual case by this rule and act accordingly, withholding the passport if the fact of the acquisition of Haytian citizenship appear."

Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, Dec. 1, 1899, For. Rel. 1899. 403.

In a previous instruction to Mr. Powell, Sept. 2, 1899, Mr. Hay said: "It appears that the persons you describe are either persons who have emigrated from the Southern States of the Union as settlers in Hayti under grants of land, or the children of such settlers born in Hayti. It therefore becomes pertinent to ascertain, if possible, whether the grants to these colonists were conditioned upon the assumption by them of full or qualified Haytian allegiance. Such a condition is common in grants of land to immigrant settlers. If these persons immigrated to Hayti and took up land under a contractual tenure, whereby they shared in the political concerns of the Republic, that circumstance would, *prima facie*, establish an adoption of a new status and an abandonment of their original status, which would operate to give their children born in Hayti the character of Haytian allegiance, but to what extent, if at all, would depend upon the terms of their grants." (For. Rel. 1899, 400.) In response to this instruction Mr. Powell sent the information on which the instruction of December 1, 1899, was based.

### 3. COLLECTIVE NATURALIZATION.

#### (1) BY POLITICAL INCORPORATION.

#### § 379.

The "nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided."

Opinion of Ch. Jus. Fuller, concurred in by Justices Blatchford, Bradley, Lamar, and Brewer, *Boyd v. Thayer*, 143 U. S. 135, citing *United States v. Ritchie*, 17 How. 525, 539; *Inglis v. Trustees*, 3 Pet. 99; *McIlvaline v. Cox's Lessee*, 4 Cranch, 209; *Shanks v. Dupont*, 3 Pet. 242; *Crane v. Reeder*, 25 Mich. 303.

For examples of the collective naturalization of American Indians, see *Elk v. Wilkins*, 112 U. S. 94.

On the transfer of territory by one sovereign to another, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the Government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and while the law which may be denominated political is necessarily changed, that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the state.

*American Ins. Co. v. Canter*, 1 Pet. 511, 542; *United States v. Repentigny*, 5 Wall. 211.

As to the annexation of territory, see *supra*, § 83 et seq.

See, also, *Morse*, Status of Inhabitants of Territory acquired by Discovery, Purchase, Cession, or Conquest, according to the Usage of the United States, 39 Am. Law Reg. (June, 1900), 332.

By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former Government are changed, and new ones arise between them and the new Government. The manner in which this is to be effected is ordinarily the subject of treaty. The contracting parties have the right to contract to transfer and receive, respectively, the allegiance of all the native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, are, when released therefrom, remitted to their original status.

*Tobin v. Walkinshaw, McAllister*, 186.

“In truth, we must divide the people of the United States into two classes: those in the full enjoyment of all the rights of citizenship, and those deprived of some or all of those rights; and then we must distinguish between such of the inhabitants of the country as are citizens, and such as are subjects only, and whether capable or not of becoming citizens, yet not so at the present time. I allude, in the latter case, to the Indians, who, in some of the States, are the subjects of the State in which they exist, but who are in general subjects of the United States; and to the Africans or persons of African descent, who, being mostly of servile condition, are, of course not citizens, but subjects, in reference as well to the respective States in which they reside as to the United States.”

*Cushing*, At. Gen., Oct. 31, 1856, 8 Op. 139, 142.

Many illustrations “from the practice and legislation of Great Britain and other foreign countries might be adduced to show that the status of the islanders as nationals, but not as citizens, has in it nothing anomalous, and that it is far more logical, as well as more just and expedient, to consider them as such rather than to treat them as

allens. The Attorney-General of the United States in his argument in the Insular Cases suggested and ably maintained that the islanders were American subjects. That term, however, is one which is foreign to our legal system and alien to our trend of political thought. The term 'national' fits the case more accurately and bears with it no unpleasant inference of political inferiority or servitude to an individual." (Frederic R. Coudert, jr., *Our New Peoples: Citizens, Subjects, Nationals, or Aliens*; *Columbia Law Review*, January, 1903.)

On the admission of a State into the Union, as has been done in various cases, "a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission."

Opinion of Fuller, C. J., concurred in by Justices Blatchford, Lamar, and Brewer, *Boyd v. Thayer*, 143 U. S. 135, 170, citing *Minor v. Happersett*, 21 Wall. 162, 167.

See also *State v. Boyd*, 31 Neb. 682.

As to the annexation and admission of Texas, see *infra*, § 103.

Inhabitants of the Territory of Nebraska at the time of its admission as a State into the Union, who had previously declared their intention to become citizens of the United States, were by the enabling act admitted to such citizenship.

*Bahnaud v. Blize* (1901), 105 Fed. Rep. 485, citing *Boyd v. Thayer*, 143 U. S. 135.

By Art. III. of the treaty of April 30, 1803, by which France ceded Louisiana to the United States, it was stipulated that "the inhabitants of the ceded territory" should "be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

By this stipulation, citizenship of the United States was conferred on the inhabitants of the territory.

Opinion of Fuller, C. J., concurred in by Justices Blatchford, Lamar, and Brewer, *Boyd v. Thayer*, 143 U. S. 135, 164, citing *Dred Scott v. Sandford*, 19 How. 393, 525; *Desbois' Case*, 2 Martin, 185; *United States v. Laverty*, 3 Martin, 733.

As to the annexation of Louisiana, see *supra*, § 101.

All persons, inhabitants of the Territory of Orleans, at the time of its admission as a State into the Union, became thereby citizens of Louisiana and of the United States. *Desbois' Case*, 2 Martin, 185; *United States v. Laverty*, 3 Martin, 733.

*Hennen's La. Dig.*, ed. 1861, I. 246.



“This form relates only to those born in some foreign country who claim to be citizens solely by virtue of a residence in Louisiana at the time of the cession, or at the period when the Constitution was adopted, leaving the cases of citizenship by nativity in the United States, in Louisiana, before the cession, with residence afterwards, and by naturalization, to be proved in such other manner as may be legal and satisfactory to the public agent whose protection is required.”

Mr. Livingston, Sec. of State, to Mr. Robertson, consul at Tampico, June 29, 1831, enclosing a notice in regard to the issuance of evidences of citizenship. (3 MS. Desp. to Consuls, 341.)

By Art. VI. of the treaty of Feb. 22, 1819, by which certain cessions of territory were made by Spain to the United States, **Florida treaty.** it was stipulated that the “inhabitants” of the ceded territories should be “incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.”

See, as to the effect of this stipulation, *Am. Ins. Co. v. Canter*, 1 Pet. 511; *Contested Elections*, 1834, 1835, 38 Cong. 2 sess. 41; *Boyd v. Thayer*, 143 U. S. 135, 168.

As to the annexation under the treaty of 1819, see *supra*, § 102.

All persons who were citizens of Texas at the date of annexation, viz, December 29, 1845, became citizens of the United States by virtue of the collective naturalization effected by the act of that date. **Annexation of Texas.**

*Akerman*, At. Gen., 1871, 13 Op. 397.

As to the annexation of Texas, see *supra*, § 103.

A person born in Texas and removing therefrom before the separation from Mexico remains a citizen of Mexico, though a minor when the separation took place.

*Jones v. McMasters*, 20 How. 8.

Inhabitants of Texas who, at the time of the annexation, were not citizens thereof, could thereafter become citizens of the United States only by the usual process of naturalization. This rule was held to apply to a minor alien, a German subject, residing in Texas at the time of the annexation, who, although he was separated from his parents, had not become a citizen of the State; and, as it did not appear that he was afterwards naturalized as a citizen of the United States, it was held that he could not assert a claim in that character.

*Contzen v. United States* (1900), 179 U. S. 191, affirming the judgment of the court below.

The constitution of Texas provides that "all persons (Africans, the descendants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence shall be considered citizens of the republic." The date of the declaration of independence was March 2, 1836. Held, that an alien who became a resident in 1845, a few months before the annexation of Texas to the United States, did not thereby become a citizen of the United States. (*Contzen v. United States*, 33 Ct. Cl. 475.)

By section 4 of the act of Congress of April 30, 1900, "to provide a government for the Territory of Hawaii," "all persons who were citizens of the Republic of Hawaii on August 12, 1898," the day of the formal transfer of sovereignty to the United States, were "declared to be citizens of the United States and citizens of the Territory of Hawaii;" and it was further provided that "all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August 12, 1898, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year, shall be citizens of the Territory of Hawaii."

31 Stat. 141.

By section 100 of the same act, the naturalization laws of the United States are extended to Hawaii.

Under sec. 4 of the act of April 30, 1900, Chinese persons born or naturalized in the Hawaiian Islands previously to Aug. 12, 1898, and who have not since lost their citizenship, are citizens of the United States; and the wife and children of such persons are entitled to enter the United States by virtue of the citizenship of the husband and father.

Griggs, At. Gen., Jan. 16, 1901, 23 Op. 345; Griggs, At. Gen., Jan. 16, 1901, 23 Op. 352.

This opinion is followed in Mr. Hay, Sec. of State, to Mr. Conger, min. to China, Dec. 21, 1901, For. Rel. 1901, 130-132.

By Art. IX. of the treaty of peace between the United States and Spain of Dec. 10, 1898, it was provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Pending legislation by Congress on the subject, it was held that native inhabitants of Porto Rico temporarily sojourning abroad might be registered as such in the legations and consulates of the United States, and were when so registered entitled to "official protection" "in all matters where a citizen of the United States similarly situated would be entitled thereto," care being taken to have it appear that they were "protected

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Philippines.

as native inhabitants of Porto Rico and not as citizens of the United States."

Mr. Hay, Sec. of State, to the diplomatic and consular officers of the United States, circular, May 2, 1899, For. Rel. 1900, 894.

See Mr. Hay, Sec. of State, to Mr. Miranda, June 10, 1899, 237 MS. Dom. Let. 466; Mr. Cridler, 3d Assist. Sec. of State, to Mr. Macallister, No. 43, April 14, 1899, 166 MS. Inst. Consuls, 630; Mr. Cridler to Mr. Johnson, No. 50, Aug. 23, 1899, 169 MS. Inst. Consuls, 38.

Under this circular, native inhabitants of Porto Rico were entitled to the official intervention of the United States in respect of losses sustained during revolutions in Venezuela. (Mr. Hay, Sec. of State, to Mr. Loomis, min. to Venezuela, No. 314, Dec. 23, 1899, 4 MS. Inst. Venezuela, 686.)

The circular of May 2, 1899, was applicable to Spain. (Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, No. 182, June 4, 1900, MS. Inst. Spain, 28.) See *supra*, p. 295.

While Porto Rico, after annexation, and pending legislation by Congress, was under military government, it seemed to be unobjectionable, so far as international relations were concerned, for the military commander to offer to foreign residents, identified by domicile or business with local interests, an opportunity to vote at municipal elections; but until Congress should have determined, pursuant to the treaty of peace, the political status of the native inhabitants of the island, and have provided in substance and form for their acquisition of citizenship, it did not appear to be within his province to establish any formality, directly or indirectly, contemplating the future naturalization of foreigners residing there.

Mr. Hay, Sec. of State, to Sec. of War, Jan. 27, 1900, 242 MS. Dom. Let. 430.

See, also, Mr. Hay, Sec. of State, to Mr. Cambon, French amb., April 10, 1900, No. 294, MS. Notes to French Leg. XI. 33.

"This Department concurs in the view expressed in the communication of the Secretary of State and Government of Cuba that, under international law and the treaty of peace with Spain [of Dec. 10, 1898], the native inhabitants of Puerto Rico ceased to be Spanish subjects upon the ratification of the treaty."

Mr. Hay, Sec. of State, to Sec. of War, Jan. 29, 1900, 242 MS. Dom. Let. 443.

The treaty of Dec. 10, 1898, did not make the inhabitants of the ceded territory citizens of the United States.

Goetze v. United States, 103 Fed. Rep. 72.

But they ceased to be "aliens," in the sense of the immigration laws.

Gonzales v. Williams (1904), 192 U. S. 1, reversing *In re Gonzales*, 118 Fed. Rep. 941.

By the act of April 12, 1900, in relation to the government of Porto Rico, all inhabitants of the island continuing to reside therein, who were Spanish subjects on April 11, 1899 (the day of the exchange of ratifications of the treaty of cession), and who then resided in Porto Rico, and their children subsequently born, were declared to be "citizens of Porto Rico, and as such entitled to the protection of the United States," except such as should have elected to preserve their allegiance to the Crown of Spain on or before April 11, 1900, in conformity with Art. IX. of the treaty of cession.

"The undisputed attitude of the executive and legislative departments of the Government has been and is that the native inhabitants of Porto Rico and the Philippine Islands did not become citizens of the United States by virtue of the cession of the islands by Spain by means of the treaty of Paris. It was not the intention of the commissioners who negotiated the treaty to give those inhabitants the status of citizens of the United States. The act for the temporary government of Porto Rico did not confer upon the native inhabitants of that island Federal citizenship, but denominated them citizens of Porto Rico."

Griggs, At. Gen., Jan. 23, 1901, 23 Op. 370.

"Passports are issued by the Department to persons entitled thereto, declaring that they are citizens of Porto Rico, and as such entitled to the protection of the United States."

Mr. Adee, Act. Sec. of State, to Mr. Vilas, Aug. 30, 1900, 247 MS. Dom. Let. 448.

"A Porto Rican is entitled under the law to the fullest protection. The legation should see that the applicant enjoys every right and that no obstacle be placed in the way of his contemplated departure from Chile for Porto Rico."

Mr. Hill, Act. Sec. of State, to Mr. Lenderink, chargé in Chile, April 29, 1901, For. Rel. 1901, 32.

It will be observed that natives of the Philippines were not mentioned in the circular of May 2, 1899, *supra*. They were not so included because the question was complicated in those islands by the existence of native insurrection. In the case, however, of two young Filipinos, aged 15 and 14, attending school in Switzerland, who bore a "cedula personal" as citizens of Manila temporarily residing in that country, the legation at Berne was authorized to state "that they are natives of the Philippine Islands temporarily residing in Switzerland, and as such are entitled to the protection of the United States."

Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switzerland, Dec. 28, 1900, For. Rel. 1900, 905.

Pending legislation by Congress, it was held by the Department of State that Filipinos were not subject to the extraterritorial judicial jurisdiction of United States consuls in China.

Mr. Cridler, Third Assist. Sec. of State, to Mr. Johnson, consul at Amoy, No. 63, July 23, 1900, 173 MS. Inst. Consuls, 446; to Mr. Goodnow, consul gen. at Shanghai, No. 205, July 24, 1900, 173 MS. Inst. Consuls, 465; to Mr. Johnson, consul at Amoy, No. 65, Aug. 20, 1900, 174 MS. Inst. Consuls, 2.

"With reference to the question asked in two memoranda from the British embassy, dated May 26 and August 13, 1900, whether Filipinos regularly shipped on British merchant vessels are regarded by the Government of the United States as citizens of the United States, so that when the British vessels upon which they have shipped touch at ports of the United States the Filipino seamen have the right to demand to be discharged although the voyage for which they have shipped may not be ended, the Attorney-General, to whom the question was referred, holds, in his opinion dated February 19, 1901, that seamen born in the Philippine Islands 'are not citizens of the United States within the meaning of any statutes concerning seamen or any other statute or law of the United States.'"

Memorandum of the Department of State, Feb. 28, 1901, For. Rel. 1901, 200.

In a previous memorandum of July 19, 1900, on the same subject, the Department of State said: "A man may be a citizen in one sense of the word, or from certain points of view, or for certain purposes, yet not in every sense nor for all purposes." (For. Rel. 1901, 199.)

By the act of July 1, 1902, all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on April 11, 1899, and their children subsequently born, are declared "to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of [Art. IX. of] the treaty of peace."

32 Stat. I. 692.

## (2) PROVISION FOR INDIVIDUAL ELECTION.

### § 380.

By the treaty of peace between the United States and Mexico, Feb. 2, 1848, Art. VIII., it was stipulated that Mexicans who preferred to remain in the territories ceded to the United States might "either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States," but that they should be obliged "to make their elec-

*Treaty of Guadalupe Hidalgo.*

tion " within a year from the date of the exchange of ratifications of the treaty, and that those who should remain after the year without having "declared their intention to retain the character of Mexicans," should be "considered to have elected to become citizens of the United States."

By Art. IX. it was stipulated that Mexicans who should not preserve their Mexican nationality should be "incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution."

See, as to the annexation of the Mexican territories, *supra*, §§105, 106.

As to the effect on the citizenship of the inhabitants, see *McKinney v. Savlejo*, 18 How. 235; *Cryer v. Andrews*, 11 Tex. 170; *Barrett v. Kelly*, 31 Tex. 476; *Boyd v. Thayer*, 143 U. S. 135.

As to the declaration of intention to elect American citizenship under the treaty of 1848, see *Quintara v. Tomkins*, 1 N. M. 29; *Carter v. Territory*, 1 N. M. 317.

"It is possible that there may be Mexicans in Upper California, who were there at the period of the conclusion of the treaty, who may have availed themselves of the privilege of retaining their nationality which that instrument secured to them. There are no doubt others who were there at that time who, voluntarily or involuntarily, have become citizens of the United States, pursuant to the terms of the article referred to. It is presumed that it is not in behalf of the latter that Mr. Larrainzar solicits the protection of this Government."

Mr. Marcy, Sec. of State, to Mr. Larrainzar, April 28, 1853, MS. Notes to Mex. Leg. VI. 348.

There is no provision in the acts of Congress relative to the admission of California as a State, whereby alien residents of the territory were admitted to citizenship on its admission to the Union.

Mr. Hunter, Act. Sec. of State, to Mr. Nones, May 12, 1852, 40 MS. Dom. Let. 123.

"The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. . . . The uncivilized tribes will be subject to such laws and regulations as

**Alaskan cession.**

the United States may from time to time adopt in regard to aboriginal tribes of that country."

Art. III., treaty between the United States and Russia, March 30, 1867, ceding Alaska to the United States.

As to the cession of Alaska, see *supra*, § 107.

"Who are citizens of the United States in Alaska, under article 3 of the treaty of 1867, may be a difficult question to determine. The treaty furnishes the law, but the difficulty, if any, will arise in the application of it." (*Deady, J., Kle v. United States* (1886), 27 Fed. Rep. 351.)

"Whether any proceeding in the nature of naturalization is requisite, and, if so, where it is to be had, are legal questions which this Department must refer to your own investigation. . . . If the original Russian subject desires a passport for the purpose of returning to Russia, and has not been naturalized by the order of some competent court, the question whether he brings himself within the terms of the treaty as one of those who 'prefer to remain in the ceded territory' will deserve serious consideration." (Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Solomon, July 5, 1870, 85 MS. Dom. Let. 227.)

H., a resident of Alaska at the time of annexation, some months afterwards left the country and took up his residence in Russia, where, in order to qualify himself to contract marriage with a lady in the titled class, he bought an estate, the possession of which he supposed to carry with it the title of "Prince"; but, after he became engaged to the lady in question he was denounced to the police, by the person who had sold him the estate, as the claimant of a title to which he had no right. He received a warning on the subject, and, disregarding it, was thrown into prison, where he was afterwards detained on suspicion of being an escaped Siberian convict. It seems that a passport was issued to him in 1872, just prior to his arrest, by the American legation at St. Petersburg, "on the faith of a passport granted him in Alaska." It was "doubtful if American citizenship was ever acquired" by H.; "but, supposing it true that he had been naturalized, it is plain that his course in Russia . . . was of a nature to expatriate him, and to render him again a subject of the Russian Empire."

Mr. Evarts, Sec. of State, to Mr. Stoughton, min. to Russia, No. 33, Oct. 29, 1878, MS. Inst. Russia, XVI. 65.

"By Article II. of the treaty of Frankfort, of May 10, 1871, between France and Germany, it was provided that French subjects born in Alsace-Lorraine, and actually domiciled therein, who desired to preserve their French nationality, should be allowed till October 1, 1872, to declare their intention to do so, before competent authority, and to remove their domicile to France."

Mr. Moore, Asst. Sec. of State, to Mr. Schmidt, May 11, 1898, 228 MS. Dom. Let. 414.

Art. IX. of the treaty of peace between the United States and Spain, of Dec. 10, 1898, provides: "Spanish subjects natives of the Peninsula," residing in the ceded or relinquished territory, who remain in such territory, "may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the exchange of the ratification of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside."

The phrase, "Spanish subjects, natives of the Peninsula," includes natives of the Balearic and Canary Islands, the word "Peninsula" "being taken to refer to the political kingdom and not to the geographical territory."

Mr. Hay, Sec. of State, to Duke of Arcos, Spanish min., Nov. 27, 1899, MS. Notes to Span. Leg. XI. 465. See, to the same effect, Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, No. 102, Nov. 29, 1899, MS. Inst. Spain, XXII. 643.

See Mr. Hill, Act. Sec. of State, to Sec. of War, Oct. 6, 1899, 240 MS. Dom. Let. 404.

The phrase in question does not include "Spanish subjects born of Spanish parents in Venezuela and Chile."

Mr. Hay, Sec. of State, to Sec. of War, April 10, 1900, 244 MS. Dom. Let. 268.

Obviously it does not include natives of Cuba. (Mr. Hill, Act. Sec. of State, to Mr. Storer, min. to Spain, No. 297, Feb. 21, 1901, MS. Inst. Spain, XXIII. 108.)

July 11, 1899, the United States military authorities in Cuba issued an order stating that Spanish subjects, natives of the Peninsula of Spain, who resided in Cuba and were desirous of preserving their Spanish nationality, might declare their intention before the mayor of the municipality in which they lived within one year from April 11, 1899. The order contained instructions as to the form in which the declaration should be drawn up. A similar system of registration was put in force in Porto Rico and the Philippines. On request of the Spanish minister at Washington, the military authorities in Cuba were instructed to send lists of the registration to the consulate-general of Spain at Havana. In December, 1899, the Spanish minister at Washington requested an extension of the time provided by the treaty, on the ground that no effective machinery existed either in Cuba, Porto Rico, or the Philippines for recording the options of Spanish subjects. The Department of State replied that it was not in the power of the Executive to extend the treaty period, and that the Secretary of War had stated that as the declara-



tion of election could be made "before any court of record, it is in the power of Spanish subjects to avail themselves of the privilege granted by the treaty at any time within the period prescribed." The Spanish minister, however, took the ground that, as the treaty provided that the declaration might be made "within one year after the exchange of the ratifications," it was the evident intention of the contracting parties to allow an effective year, and that as the order of the military authorities in Cuba was issued only on July 11, 1899, and the registration offices were opened only on the 18th of the same month, the full opportunity required by the treaty had not been allowed in Cuba. He also stated that the corresponding order in Porto Rico bore date August 21, but was not officially published until the 13th of the following month, while the registration offices were not opened till some time later. In the Philippines the opportunity had been even less, and he concluded that the then existing condition of things was tantamount to an annulment of the privilege granted by the treaty. The Department of State, in its reply, pointed out the ample opportunity afforded to all Spaniards in Cuba and in Porto Rico for making the declaration, the United States having thrown open the *alcaldias* of every town and hamlet for the purpose, instead of limiting the registration to courts of record, thus furnishing to each declarant the facility of registration almost at his door. The creation of a special machinery for registration was a special favor shown by the United States, there being no requirement of it in the treaty, so that the whole conventional opportunity had been fully given both in Cuba and in Porto Rico. As to the Philippines, the case was thought to be different, and it was considered just that the period should be extended by a new treaty for six months from April 11, 1900, unless it should be proved that before that time all the Peninsular Spaniards residing in those islands had in fact had a full opportunity to make the optional declaration which the treaty allowed.

For. Rel. 1899, 715, 716, 717-718, 719-720.

By a protocol signed at Washington March 29, 1900, the period of a year fixed by Art. IX. of the treaty of peace between the United States and Spain of Dec. 10, 1898, during which Spanish subjects, natives of the Peninsula, residing in the territory ceded or relinquished by Spain, might declare their intention to retain their Spanish nationality, was extended as to the Philippines for six months from April 11, 1900.

This protocol was duly approved by the Senate. (Mr. Hay, Sec. of State, to Sec. of War, April 28, 1900, 244 MS. Dom. Let. 506.)

"An examination of Article IX. of the treaty of Paris shows that Spaniards residing in the ceded or relinquished territories were to have a year within which to make up their minds whether to preserve—not acquire—Spanish nationality, and I think there is no doubt that a Spaniard born in the Peninsula who died in Cuba before the expiration of that year was, in the contemplation of the

treaty, a Spanish subject at the time of his death." (Griggs, At Gen., April 26, 1900, For. Rel. 1901, 226, 227.)

"ARTICLE 1. Natives of the territories ceded or relinquished by Spain by virtue of the treaty of peace with the United States of the 10th of December, 1898, who at the date of the exchange of ratifications of said treaty were residing in said territories and have lost their Spanish citizenship (*la nacionalidad española*), may recover it in accordance with the provisions of article 21 of the civil code prescribed for Spaniards who have lost their nationality by acquiring citizenship in a foreign country.

"Nevertheless, persons referred to in the paragraph above, who were holding public office, civil or military, employment, or appointment by nomination of the Spanish Government, and who continued to exercise their official functions in the service of Spain, shall be held to have retained their Spanish nationality.

"ART. 2. Natives of the territories ceded or relinquished, who at the date of the exchange of ratifications of the treaty of the 10th of December, 1898, as aforesaid, were residing outside of the country of their birth, and who at the time of the promulgation of this decree are found to be inscribed in the registers of the legations or consulates of Spain abroad, or who were holding public office under the Spanish administration, or who were domiciled within the actual dominions of Spain, shall be held to have retained their Spanish citizenship, unless within the period of a year from this date they shall make an express declaration to the contrary before the proper authorities.

"The persons referred to in the paragraph above, who at the time of the promulgation of this decree do not fall within any of the categories above mentioned, have lost their Spanish nationality. They may recover the same in accordance with the provisions of the above-mentioned article 21 of the civil code.

"ART. 3. Spanish subjects born outside of the territories ceded or relinquished, who were residing therein at the date of the exchange of the ratifications of the treaty of the 10th of December, 1898, and would have lost their Spanish citizenship by not exercising within the proper period the right of option set forth in article 9 of said treaty, may recover the same by leaving said territories and complying with the formalities established in the second paragraph of article 19 of the civil code.

"The persons referred to in the present article who, contrary to their wishes, have not been permitted to inscribe themselves as Spaniards in the municipal registers, may do so within the period of one year from this date before the Spanish consular registrars, making a note of the inscription which was denied to them in the municipal registrars. Those who fulfill this requirement shall be held to have

retained without interruption their Spanish citizenship. Nevertheless, the persons referred to in the first paragraph of this article who reside in the ceded or relinquished territories by reason of public office, military or civil, employment, or appointment, the functions of which they were discharging at the time and which they continued to discharge in the service of Spain, shall be held not to have lost their Spanish citizenship.

"ART. 4. The persons referred to in this decree who, subsequently to the exchange of ratifications of the treaty of peace with the United States, shall have held public office or taken part in the municipal, provincial, or general elections of the territories ceded or relinquished by Spain, or who shall have exercised in said territories any of the rights pertaining to citizenship therein, shall not be granted an option in favor of or a recovery of their Spanish citizenship, except as provided in article 23 of the civil code.<sup>a</sup>

"ART. 5. Spanish citizenship retained or recovered by virtue of the provisions of this decree can not be set up as against the governments or authorities of the ceded or relinquished territories in which the parties concerned were born or reside, except by the express consent of said governments or by virtue of a stipulation in an international treaty.

"ART. 6. The persons who (in accordance with the prescriptions of this decree) would have lost their Spanish citizenship and consequently the right to draw any retiring fund or pension whatsoever, whether the same may have been actually granted or not, shall recover said rights at the same time with the recovery of Spanish citizenship in the following cases and subject to the following conditions:

"First. The payment of any retiring fund or pension necessarily demands the residence of the beneficiary within the actual dominions of Spain and submission to the regulations which govern or in the future may govern said pensions.

"Second. All restorations or rehabilitations for the purpose of drawing retiring funds or pensions must be preceded by an examination and revision of the claims upon which it might have been granted. Said rehabilitation will be subjected in the various cases to the following rules:

"A. The persons referred to in the first paragraph of article 1 and in the second paragraph of article 2 of this decree may draw the retiring funds or pensions to which they are entitled, provided they recover Spanish citizenship within the period of one year from this

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<sup>a</sup> Article 23 of the civil code provides that "any Spaniard who loses his nationality by accepting employment of any other Government, or by entering the armed service of a foreign power without the King's permission, shall not recover Spanish citizenship without previously obtaining the royal authorization."

date; the right to draw said pension, however, commencing from the date of the presentation of a petition requesting the examination and revision of their claims.

"B. Those persons referred to in the first paragraph of article 3 who within the period of two years shall recover Spanish citizenship in the manner therein prescribed, shall be completely restored to the enjoyment of their respective retiring funds or pensions.

"ART. 7. The persons referred to in article 4, no matter what be the manner in which they may have recovered Spanish citizenship, shall in no case be restored to the enjoyment of the retiring funds or pensions to which they might have been entitled.

"ART. 8. The persons referred to in this decree who, in accordance with the provisions of the same, shall have lost the right to any retiring fund or pension whatsoever, shall, nevertheless, be entitled to petition the Government to grant them, for special services rendered to the cause of Spain, pensions as a reward therefor, in accordance with the prescriptions of the law of the 12th of May, 1837, it being further permissible in such a case to waive the residence in Spanish territory which is prescribed as a condition to their enjoyment.

"ART. 9. The ministry of state, grace and justice, hacienda, and gobernación shall draw up the necessary provisions for the application of this decree in their respective departments. Given at the palace the 11th of May, 1901.

"MARIA CHRISTINA.

"The president of the council of ministers,

"PRÁXEDES MATEO SAGASTA.

*"Appendix.*

"I. Article 19 of the civil code prescribes that children of a foreigner born in Spanish dominions who desire to acquire Spanish citizenship shall, within the year following their majority or emancipation, make a declaration to that effect.

"Those who are in the Kingdom should make this declaration before the official in charge of the civil registry of the town in which they reside; they who reside in a foreign country, before one of the consular or diplomatic agents of the Spanish Government, and they who are in a country in which the Government has no agent, should address the Spanish minister of state.

"II. Article 21 provides that: 'A Spaniard who loses his citizenship by acquiring naturalization in a foreign country, can recover it on returning to the Kingdom by declaring before an official in charge of the civil registry of the domicil which he elects that such is his wish, in order that the official may make the corresponding inscription therein, and by renouncing the protection of the flag of such country.'

In a report to the Queen Regent of the same date, accompanying the royal decree, Premier Sagasta said:

"Since the 10th of December, 1898, when the treaty of peace with the United States of America was signed, it has been a subject of constant preoccupation to the succeeding Spanish Governments to solve in a just and equitable way the important questions concerning the nationality of the natives and inhabitants of the territories ceded or relinquished by Spain arising in connection with the interpretation of the ninth article of that treaty. With this end in view the former Government entrusted the study of these important questions to a committee composed of learned functionaries from the ministries of state, grace and justice, hacienda, and gobernación, which fulfilled its task by publishing a brilliant report wherein the various delicate aspects of the question are treated with the greatest clearness and accuracy.

"The Government, desirous of reconciling the interests of private individuals with its international obligations, without increasing unduly the charges upon the national treasury, and at the same time attempting to harmonize the political and economical aspects of the question, has come to the conclusion that while there can be no doubt as regards the fact that natives and inhabitants of the territories ceded or relinquished lost their Spanish citizenship the moment that the sovereignty of Spain over those countries came to an end, nevertheless those persons who, while residing outside of the country of their origin, made a clear manifestation of their desire to retain their Spanish citizenship, either by having themselves inscribed in a legation or consulate of Spain abroad, or by continuing to serve in the administration, or by establishing themselves within the actual dominions of Spain, deserve to be considered by the Government as Spanish subjects so long as the acts which manifest their purpose of retaining Spanish citizenship be not disavowed by the solemn declaration of the party in interest made within a certain period which will be fixed for this purpose.

"A further point of real importance is that in regard to the exact moment when the fact of residing within or without the territories ceded or relinquished by Spain began to be a determining factor. As to this the Government takes the ground that it can be no other than the moment at which the change of sovereignty was judicially defined to have taken place, viz, the moment of the exchange of the ratifications of the treaty of peace. Likewise it appears entirely free from doubt that all the persons who, while they may have been born in the above-mentioned territories and living therein at said date are, nevertheless, still discharging official functions by virtue of appointment or commission held from the Spanish Government, should preserve their nationality.

"There remained another point of great importance to be solved, viz, the manner in which those who have lost their citizenship by not availing themselves of the opportunity provided in the first paragraph of the ninth article of the treaty should recover the same, and nothing can be more just than to facilitate the recovery of citizenship by those who lost it in this manner, and that they should recover it by leaving said territories and fulfilling the requirements prescribed in the second paragraph of article 19 (App. I., *supra*) of the civil

code; provided, however, that said persons have not held public office or taken part in the elections in the territories ceded or relinquished by Spain, nor exercised therein any right pertaining to the new citizenship since the extinction of the Spanish sovereignty, since such acts would prevent their being recognized as Spanish subjects, unless it be in the manner set forth in article 21 (App. II., supra) of the civil code." (For. Rel. 1901, 474.)

The royal decree of Spain of May 11, 1901, in relation to the effect of the treaty of peace of Dec. 10, 1898, on the citizenship of the inhabitants of the territories thereby ceded or relinquished by Spain, does not violate the rights of the United States or the provisions of the treaty.

Opinion of Mr. Magoon, law officer, Division of Insular Affairs, approved by the War Department, and accepted by the Department of State. Magoon's Reports, 173.

#### IV. AMERICAN NATURALIZATION.

##### 1. REGULATED BY CONGRESS.

#### § 381.

By the 14th Amendment to the Constitution of the United States "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

*Behrensmeier v. Kreitz*, 135 Ill. 591, 26 N. E. 704. See, also, as to the law previously, *Osborn v. United States Bank*, 9 Wheat. 738.

The power to pass naturalization laws is exclusively vested in Congress.

*United States v. Villato*, 2 Dallas, 370; *Chirac v. Chirac*, 2 Wheat. 259; *Thurlow v. Massachusetts*, 5 How. 573, 585; *Norris v. Boston*, 7 How. 518; *Golden v. Prince*, 3 Wash. C. C. 314. Compare *Collet v. Collet*, 2 Dall. 294; *Dred Scott v. Sandford*, 19 How. 393.

See the *Legislative History of Naturalization in the United States, 1776-1795*, by F. G. Franklin, Ph. D., Ann. Report of the Am. Hist. Association, 1901, I. 301-317.

The following statutes of the United States relate to citizenship and naturalization: March 26, 1790 (1 Stats. at Large, 103); January 29, 1795 (1 Stats. at Large, 414); June 18, 1798 (1 Stats. at Large, 566); April 14, 1802 (2 Stats. at Large, 153); March 26, 1804 (2 Stats. at Large, 292); March 3, 1813 (2 Stats. at Large, 811); July 30, 1813 (3 Stats. at Large, 53); March 22, 1816 (3 Stats. at Large, 258); May 26, 1824 (4 Stats. at Large, 69); May 24, 1828 (4 Stats. at Large, 310); June 26, 1848 (9 Stats. at Large, 240); February 10, 1855 (10 Stats. at Large, 604); July 17, 1862 (12 Stats. at Large, 597); April 9, 1866 (14 Stats. at Large, 27); July 27, 1868 (15 Stats. at Large, 223); sec. 5, June 17, 1870 (16 Stats. at Large, 154); July

14, 1870 (16 Stats. at Large, 254) ; sec. 29, June 7, 1872 (17 Stats. at Large, 268) ; Revised Statutes, sections 1992-2001, 2165-2174, 4075-4078, 4749, 5424-5429 ; February 18, 1875 (18 Stats. at Large, 318) ; February 1, 1876 (19 Stats. at Large, 2) ; sec. 14, May 6, 1882 (22 Stats. at Large, 61) ; July 26, 1894 (28 Stats. at Large, 123, 124).

See, as to naturalization, *Behrensmeyer v. Kreitz*, 135 Ill. 591.

"Our courts admit aliens to citizenship upon compliance with the requirements of our naturalization laws without regard to any claims upon them of the country of their origin." (Mr. Hay, Sec. of State, to Mr. Harris, min. to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31.)

By the act of April 30, 1900, to provide a government for the territory of Hawaii, the naturalization laws of the United States were declared to be applicable to persons in the islands.

See For. Rel. 1896, 387, for an act of the legislature of the Republic of Hawaii, approved June 15, 1896, "to prescribe the procedure in proceedings for naturalization of aliens."

## 2. COMMITTED TO THE COURTS.

### § 382.

Naturalization is a judicial act, which must be performed by the court.

The *Acorn*, 2 Abb. 434 ; *Matter of Clark*, 18 Barb. 444 ; *McCarthy v. Marsh*, 1 Seld. (N. Y.) 263 ; *Green v. Salas*, 31 Fed. Rep. 106 ; In re *Coleman*, 15 Blatch. 406, 420 ; In re *An Allen*, 7 Hill, 137 ; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704 ; In re *Bodek*, 63 Fed. Rep. 813 ; *Cowan v. Prowse*, 93 Ky. 156.

As to the practice in the superior court of the city of New York, in 1879, see Judge Freedman to Mr. Evarts, Sec. of State, March 5, 1879, MS. Misc. Let.

"The executive branch of the Government can not prescribe the action of any court on a given application." (Mr. Bayard, Sec. of State, to Mr. Stuart, Sept. 9, 1885, 157 MS. Dom. Let. 93.)

The declaration of intention may be made before the clerk of the court. (Act of Feb. 1, 1876, 19 Stat. 2.)

Residence in the United States 18 years, and payment of taxes, and voting, do not of themselves constitute citizenship of the United States, which can be acquired only in the manner prescribed by the naturalization laws.

Mr. Bayard, Sec. of State, to Mr. Arakelyan, May 26, 1885, 155 MS. Dom. Let. 488.

Naturalization may be performed by "a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk."

Rev. Stats. § 2165 ; *Ex parte McKenzie* (So. Car. 1897), 28 S. E. 468.

The St. Louis court of appeals, which has common-law jurisdiction, is competent to naturalize aliens. (*Levin v. United States* (1904), 128 Fed. Rep. 826, 63 C. C. A. 476.)

It is not necessary that the State court should possess full common-law jurisdiction. (*United States v. Power*, 14 Blatch. 223, citing 8 Met. 168; 2 Curt. 98; 50 N. H. 245; 39 Cal. 98; 3 Pet. 433, 446.) But the mere fact that a court may be authorized to do certain things that pertain to courts having common-law jurisdiction does not suffice. (*Ex parte Tweedy*, 22 Fed. Rep. 84.)

The municipal court of Biddeford, Me., since it has no "clerk," is incompetent to grant naturalization. (*In re Dean*, 83 Me. 489, 22 Atl. Rep. 385.)

Certificates of naturalization issued by competent State courts are not within the purview of the circular of Jan. 10, 1871, directing that certificates of citizenship by State, municipal, or local officials are to be treated as invalid. (Mr. Fish, Sec. of State, to Mr. Jay, March 18, 1872, MS. Inst. Aust. II. 61.)

The State courts are not obliged to exercise the power conferred by § 2165. (*In re Naturalization*, 5 Pa. Dist. R. 597, 27 Pitts. L. J. (N. S.) 121.)

The State legislatures may regulate the proceedings of the State courts in such matters: e. g., by forbidding them to grant naturalization within a certain time preceding an election (*Rushworth v. Judges* (N. J.), 32 Atl. Rep. 743.); by forbidding any but certain courts to do so. (*In re Gilroy*, 88 Me. 199, 33 Atl. Rep. 979.) See, also, *Ryan v. Egan*, 156 Ill. 224.

Courts in annexed territory do not possess power to naturalize till Congress confers it. (Mr. Hay, Sec. of State, to Mr. Sewall, No. 99, Dec. 21, 1899, MS. Inst. Hawaii, III. 486.)

The courts maintained by the ministers and consuls of the United States, in countries where they exercise, by law and treaty, judicial powers, are not authorized to naturalize aliens.

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Nov. 2, 1893, For. Rel. 1893, 701.

The process of naturalization must be performed in the United States. (Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 394, 395.)

### 3. PERSONS CAPABLE OF NATURALIZATION.

#### § 383.

By the acts of 1802 and 1824, only "free white persons" were capable of naturalization. By the act of 1870, the benefits of the law were extended to "aliens of African nativity and to persons of African descent." The law, as consolidated in the Revised Statutes, thus stands, embracing only "white persons" and persons of African descent.

Acts of April 14, 1802, 2 Stat. 153; May 26, 1824, 4 Stat. 69; July 14, 1870, 16 Stat. 254; Feb. 18, 1875, 18 Stat. 318; Rev. Stats. § 2169. See Moore, *American Diplomacy*, 193.



Chinese, since they are neither of the "white" (Caucasian), nor of the African, race, are not within the general statutes relating to naturalization.

**Chinese.**

In *re Ah Yup*, 5 Sawyer C. C. 155, followed in *Mr. Evarts*, Sec. of State, to *Mr. Holcombe*, No. 250, Oct. 29, 1878, MS. Inst. China, II. 574; *State v. Ah Chew*, 16 Nev. 50, 61; *Mr. Olney*, Sec. of State, to *Mr. Ritter*, Sept. 20, 1895, 205 MS. Dom. Let. 8.

It may be observed that the courts in the United States possess no inherent power to naturalize aliens, and therefore they can exercise the power of naturalization only so far as it is given to them by statute.

By the act of 1882, the courts are expressly forbidden to naturalize Chinese.

Sec. 14, act of May 6, 1882, 22 Stat. 61; In *re Hong Yen Chang*, 84 Cal. 163; In *re Gee Hop*, 71 Fed. Rep. 274; *Fong Yue Ting v. United States*, 149 U. S. 698, 716; *Olney*, At. Gen., 1894, 21 Op. 37; *McKenna*, At. Gen., 1897, id. 581; *Mr. Adee*, Second Assist. Sec. of State, to *Mr. Wilson*, April 20, 1898, 227 MS. Dom. Let. 483.

Art. 5 of the treaty between the United States and China, signed at Washington, July 28, 1868, commonly called the Burlingame treaty, declared: "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance." The language is similar to that used in the act of July 27, 1868, as to the right of expatriation.

Expatriation includes not only emigration, but also naturalization. (*Black*, At. Gen., 9 Op. 356.)

A certificate of naturalization issued to a Chinaman is void on its face.

In *re Gee Hop*, 71 Fed. Rep. 274; In *re Hong Yen Chang*, 84 Cal. 163; *McKenna*, At. Gen., 1897, 21 Op. 581. See, also, In *re Yamashita* (1902), 30 Wash. 234, 70 Pac. Rep. 482.

As the act of 1882 forbids the naturalization of Chinese, and as passports can be legally issued only to citizens of the United States, the Department of State, which is bound to observe the law, declines to recognize a certificate of naturalization of a Chinese person as a basis for granting a passport.

*Mr. Wharton*, Act. Sec. of State, to *Mr. Heitmann*, Aug. 6, 1890, 178 MS. Dom. Let. 515; *Mr. Blaine*, Sec. of State, to *Mr. Rockwell*, Dec. 12, 1890, 180 id. 157; *Mr. Gresham*, Sec. of State, to *Mr. Hein*, Aug. 30, 1893, 193 id. 287.

The provision of section 4 of the act of Congress of April 30, 1900, entitled "An act to provide a government for the Territory of Hawaii," that "all persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United

States and citizens of the Territory of Hawaii," applies to Chinese persons who were citizens of the Republic of Hawaii by naturalization at the time mentioned.

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, Dec. 21, 1901, approving an instruction of Mr. Conger to Mr. Goodnow, consul-general at Shanghai, Nov. 1, 1901, For. Rel. 1901, 130-132.

This instruction is in conformity with the opinions of Griggs, At. Gen., 1901, 23 Op. 345, 352, and Knox, At. Gen., 1901, 23 Op. 509.

For numerous instances of collective naturalization, see *Boyd v. Thayer*, 143 U. S. 135.

Naturalization has been refused to Japanese, on the ground that they are not "white" persons.

#### Other races.

In re *Saito*, 62 Fed. Rep. 126, criticised in 28 Am. Law Rev. 818; In re *Yamashita* (1902), 30 Wash. 234, 70 Pac. Rep. 482.

Burmese, being of the Mongolian race, are not capable of naturalization.

In re *Po*, 7 N. Y. S. 383, 7 Misc. 471.

The opinion was expressed that a native of Hawaii, being neither of the "Caucasian" or white, nor of the African, race, was ineligible to citizenship; but it was also held that he did not possess sufficient education and general intelligence to be admitted. (In re *Kanaka Nian*, 6 Utah, 259, 21 Pac. Rep. 993.)

Native citizens of Mexico are capable of naturalization.

In re *Rodríguez*, 81 Fed. Rep. 337.

American Indians are not within the general statutes relating to naturalization.

*Elk v. Wilkins*, 112 U. S. 94.

Nor is a person of half white and half Indian blood. (In re *Camille*, 6 Sawyer C. C. 541.)

Indians are capable of naturalization by special law or by treaty, and have often been so naturalized. (*Elk v. Wilkins*, 112 U. S. 94; *Boyd v. Thayer*, 143 U. S. 135; *Wiggin v. Conolly*, 163 U. S. 56.)

As to who are Indians, see *Nofire v. United States*, 164 U. S. 657, 17 Supreme Ct. Rep. 212; *Stiff v. McLaughlin* (Mont.), 48 Pac. Rep. 232.

An Indian, though born in British Columbia, can not be admitted to naturalization in the United States.

In re *Burton* (1900), 1 Alaska, 111.

"An alien woman may be naturalized under the laws of the United States in the same manner and under the same con-

#### Women.

ditions that pertain to the naturalization of an alien man. Citizenship does not involve the electoral qualification.

The question is so well settled and the instances of women having been naturalized are so numerous that it is deemed unnecessary to cite you any particular cases."

Mr. Evarts, Sec. of State, to Mr. Hinton, Oct. 19, 1877, 120 MS. Dom. Let. 232.

When an alien who has made a declaration of intention "dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

Rev. Stats. § 2168; act of March 26, 1804, 2 Stat. 292.

#### 4. USUAL LEGAL CONDITIONS.

### § 384.

The ordinary conditions of naturalization in the United States are:

1. A declaration of intention to become a citizen made at least two years prior to admission to citizenship.
2. An oath of allegiance, made at the time of admission, and renunciation of prior allegiance.
3. Residence in the United States of at least five years, and in the State or Territory where the court is held of at least one year.
4. Behavior as a moral and orderly person during such residence.
5. Renunciation of hereditary title, or order of nobility, if any.

Rev. Stat. § 2165; *Behrensmeyer v. Kreitz*, 135 Ill. 591.

An applicant should be required to show that he possesses education and intelligence sufficient to qualify him for the exercise of the rights and the discharge of the duties of citizenship. (*In re Rodriguez*, 81 Fed. Rep. 337; *In re Bodek*, 63 Fed. Rep. 813; *Rushworth v. Judges*, 58 N. J. L. 97; *In re Conway*, 30 N. Y. S. 835, 9 Misc. 652; *In re Lab's Petition*, 3 Pa. Dist. R. 728; *In re Northumberland County Naturalizations*, 18 Pa. Co. Ct. 270; *In re Naturalization*, 5 Pa. Dist. R. 597, 27 Pitts. L. J. (n. s.) 121.

But an alien, otherwise qualified for naturalization, should not be excluded from citizenship because, when personally questioned by the court, he shows great ignorance of the laws and Constitution of the United States. (*Ex parte Johnson* (1901), 79 Miss. 637, citing *In re Rodriguez*, 81 Fed. Rep. 355.)

Conviction of perjury, during residence in the United States, disqualifies for admission to citizenship. (*In re Spenser*, 5 Sawyer C. C. 195.)

An applicant for naturalization should produce a voucher other than one who habitually, and for compensation, appears as such. (*In re Lipshitz*, 97 Fed. Rep. 584.)

By sec. 2171 of the Revised Statutes (acts of April 14, 1802, 2 Stat. 153, and July 30, 1813, 3 Stat. 53), no alien who is a native citizen or subject, or a denizen, of any country with which the United is at the time of his application at war, "shall be then admitted to become a citizen of the United States."

"SEC. 39. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who has violated any of the provisions of this Act, shall be naturalized or be made a citizen of the United States. All courts and tribunals and all judges and officers thereof having jurisdiction of naturalization proceedings or duties to perform in regard thereto shall, on the final application for naturalization, make careful inquiry into such matters, and before issuing the final order or certificate of naturalization cause to be entered of record the affidavit of the applicant and of his witnesses so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization. All final orders and certificates of naturalization hereafter made shall show on their face specifically that said affidavits were duly made and recorded, and all orders and certificates that fail to show such facts shall be null and void.

"That any person who purposely procures naturalization in violation of the provisions of this section shall be fined not more than five thousand dollars, or shall be imprisoned not less than one nor more than ten years, or both, and the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

"That any person who knowingly aids, advises, or encourages any such person to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not less than one nor more than ten years, or both.

"The foregoing provisions concerning naturalization shall not be enforced until ninety days after the approval hereof."

## 5. DECLARATION OF INTENTION.

## (1) USUAL REQUIREMENT.

## § 385.

An alien, in order to be admitted to citizenship, must "declare on oath . . . two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject."

Rev. Stats., §2165.

## (2) EXCEPTIONS.

## § 386.

Under Revised Statutes, § 2167, the making of a declaration of intention two years previously to admission to citizenship is not required of an alien who has resided continuously in the United States five years, three of which immediately preceded his coming of age; but he must "make the declaration required therein [i. e., in R. S., § 2165] at the time of his admission," and, besides, "declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."

*Minneapolis v. Reum*, 56 Fed. Rep. 576, 6 C. C. A. 31. See also *State v. Macdonald*, 24 Minn. 48; *Ex parte Cregg*, 2 Curtis, C. C. 98; *State v. Whittemore*, 50 N. H. 245; *Butterworth's case*, 1 Wood, & M. 323; *Ex parte Randall*, 14 Phila. 224; *Ex parte Merry*, 14 Phila. 212.

With regard to the making in this case, on admission to citizenship, of the "declaration" required in R. S., § 2165, it is to be observed that the substance of that declaration is that it is "bona fide" the individual's intention to become a citizen, while, on admission to citizenship, he in fact swears that he will support the Constitution and renounces his original allegiance.

Where naturalization is performed under § 2167, the court should exact, in addition to the applicant's oath, substantial proof of the requisite previous bona fide intention to become a citizen. (*In re Bodek*, 63 Fed. Rep. 813); the vague oral statement of a single witness is not enough. (*In re Fronascone*, 99 Fed. Rep. 48.)

By the act of April 30, 1900, a previous declaration of intention was dispensed with in the case of persons applying to be naturalized in Hawaii, who had resided there at least five years prior to the taking effect of the act. The act took effect June 14, 1900.

"The object of this provision [§ 2167] is to enable a person who has resided in the United States five years, but who, from the fact of being a minor, has not been competent to make a declaration, to make his declaration at the expiration of such five years, and be at once naturalized, provided that, at the time of his application, he is of full age. In such case his declaration is to be made 'at the time of his admission' to citizenship, which is to be construed as meaning simultaneously with his naturalization.

"It is thus intended to offer the franchise of naturalization to all persons who, on arriving at full age, have resided in the United States five years before that period. And even were the question doubtful, it is, as you are well aware, a familiar rule that in the construction of grants of franchises, that construction is to be adopted which is most favorable to the persons for whose benefit the franchise is to be granted—in *dubio mitius*."

Mr. Bayard, Sec. of State, to Mr. von Alvensleben, German min., Mar. 15, 1880, MS. Notes to Germ. X. 421.

See also Mr. Olney, Sec. of State, to Mr. Hengelmüller, Aust.-Hung. min., Dec. 5, 1895, MS. Notes to Aust. Leg. IX. 238.

It should be observed that the certificate of a person duly admitted to citizenship under § 2167 does not, or at any rate should not, recite that a prior declaration of intention under § 2165 was made.

A person naturalized under § 2167 is within the provisions of the treaty with Austria-Hungary. (Mr. Olney, Sec. of State, to Mr. Hengelmüller, Dec. 5, 1895, MS. Notes to Aust. Leg. IX. 238.)

An alien, 21 years old or upward, who enlists in the "armies of the United States," regular or volunteer, and is thereafter  
**Service in Army.** honorably discharged, may, after one year's residence in the United States, become a citizen without a previous declaration of intention.

Rev. Stats. § 2166; act of July 17, 1862, 12 Stat. 597. The word "armies" does not cover enlistments in the Navy. (In re Bailey, 2 Sawyer C. C. 200; In re Chamavas, 21 N. Y. S. 104. Contra, In re Stewart, 7 Robertson (N. Y.) 635.)

For a case under § 2166, see Mr. Frellinghuysen, Sec. of State, to Mr. Lowell, min. to England, April 25, 1882, For. Rel. 1882, 230.

The mere facts of enlistment and discharge do not confer citizenship, but only enable the individual to apply to a competent court for naturalization.

Mr. Seward, Sec. of State, to Mr. Strleby, March 31, 1868, 78 MS. Dom. Let. 269; Mr. Blaine, Sec. of State, to Mr. O'Neil, Nov. 15, 1881, 139 MS. Dom. Let. 572; Mr. Hill, Asslt. Sec. of State, to Mr. Koch, Feb. 1, 1900, 242 MS. Dom. Let. 480; Berry v. Hull, 6 N. M. 643, 30 Pac. Rep. 936.

An alien, 21 years old or upwards, who has enlisted in the United States Navy or Marine Corps, and has thereafter served five consecutive years in the Navy or one enlistment in the Marine Corps, may be admitted to citizenship without a previous declaration of intention.

Act of July 26, 1894, 28 Stats. 123, 124.

“Sec. 100. That for the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.”

Act of Congress of April 30, 1900, 31 Stat. 161.

This act took effect June 14, 1900.

### (3) DOES NOT CONFER CITIZENSHIP.

#### § 387.

The declaration of intention to become a citizen does not confer judicial decisions. citizenship.

*Minneapolis v. Reum*, 56 Fed. Rep. 576, 6 C. C. A. 31; *In re Moses*, 83 Fed. Rep. 995; *White v. White*, 2 Met. (Ky.) 185; *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809. See *Settegast v. Schrimpf*, 35 Tex. 323.

Nor make a person a citizen within the meaning of the Indian depredations act. (*Valk v. United States*, 28 Ct. Cl. 241.)

The declaration may be made only in a court competent to naturalize; but by the act of Feb. 1, 1876, it may be made before the clerk. (19 Stat. 2.)

It must be made in the clerk's office or in open court. (*In re Langtry*, 31 Fed. Rep. 879; *Sciola's Case*, 8 Pa. Co. Ct. Rep. 344. See *Andres v. Judge of Circuit Ct. (Mich.)* 43 N. W. 857.)

It cannot be made before a court having no clerk or prothonotary. (*Ex parte Gregg*, 2 Curtis, 98.)

As to the declaration of intention and the location of mining claims, see *Cresus Mining Co. v. Colorado Land Co.*, 19 Fed. Rep. 78.

The proper evidence of the declaration of intention is the certificate of the fact. (*State v. Barrett*, 40 Minn. 65; *Berry v. Hull* (N. M.) 30 Pac. Rep. 936.)

The declaration of intention by the parent does not make citizens of his children in case he dies before completing his naturalization.

On the contrary, sec. 2168, R. S., provides for the regular admission to citizenship of the widow and children of such a person.

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. at Berlin, Jan. 15, 1885, For. Rel. 1885, 394, 395.

“Passports are only granted to citizens of the United States, and as Mr. Hoesli has not yet complied with the requisitions of the naturalization laws of the United States his request can not be acceded to. No reason is perceived, however, why a consul of Switzerland should not give him a passport to his own country, as his certificate only shows his intention of becoming a citizen of the United States, and in that event to renounce his allegiance to Switzerland, which has not yet been done.”

Mr. Upshur, Sec. of State, to Mr. Triechele, Nov. 16, 1843, '33 MS. Dom. Let. 386.

A foreigner who has merely declared his intention to become an American citizen, without having carried that intention into effect, is not an American citizen.

Mr. Buchanan, Sec. of State, to Mr. Campbell, consul at Havana, July 26, 1848, 10 MS. Desp. to Consuls, 473.

Dominie Madini, an Austrian subject by birth, after having taken part in the Lombard revolution in 1848, came to the United States and made a declaration of intention to become a citizen. “In the year 1852, and before he had been long enough in this country to be entitled to naturalization, he returned to Europe and settled in Switzerland, where he has since resided, for the alleged purpose of collecting his fortune, which he has some prospect of being able to do, and then he designs to return and reside in the United States. . . . It is admitted that Madini has not been in the United States for some years. . . . The intention he may entertain, and which it is understood he has declared, to return to the United States may be changed at pleasure, and besides, such an intention, however sincere, is too remote and uncertain to found upon it any obligation for protection. . . . By Madini's departure from the United States before he was naturalized, becoming domiciled in another country and entering into business there, he relinquished all the advantages, whatever they might be, which he had gained by his temporary residence in the United States and placed himself in relation to this Government on a footing with those foreigners who have never been within its territory.”

Mr. Marcy, Sec. of State, to Mr. Fay, No. 37, March 22, 1856, MS. Inst. Switz. 1. 47.

See, also, Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, Dec. 28, 1854, MS. Inst. Peru, XV. 150.



"The mere declaration of intention to become a citizen does not absolve the party from the allegiance which he owes to the Government of the country from which he comes, and leaves him free to apply to any consul of that Government in this country for a permit to return from whence he came."

Mr. Cass, Sec. of State, to Mr. Washburne, March 9, 1857, 46 MS. Dom. Let. 379.

See, to the same effect, Mr. Cass, Sec. of State, to Mr. Smith, June 29, 1859, 50 MS. Dom. Let. 441.

"With regard to the other cases which the noble earl [Lord Derby] has brought forward, I have no knowledge of them, or I would have taken pains to inquire into each of them. I certainly do not recollect the case of any person being called on to take the oath of allegiance to the United States, except one in which there was some question with Lord Lyons, and that was the case of a gentleman who had given notice of his intention to become a citizen of the United States. Now, a person wishing to become a citizen of the United States gives notice that at a certain time—within three months—he intends to ask leave to become a citizen of the United States. When the time arrives he must not only take an oath of allegiance to the United States, but he must forswear all other allegiance, more especially to Her Majesty Queen Victoria. (Laughter.) This gentleman who was arrested made an appeal to the British Government, and the answer of Mr. Seward to the remonstrance addressed to him was, 'This gentleman has renounced all allegiance, especially to Her Majesty Queen Victoria.' The matter was further inquired into, and it was found that Mr. Seward was wrong in his fact—(hear, hear)—that this gentleman had given notice that he intended to become a citizen of the United States, and to forswear all allegiance to Her Majesty, but he still remained a British subject. He had thus placed himself in a position in which he could not claim the protection of either one government or the other. (Laughter.)"

Earl Russell, Foreign Secretary, in the House of Lords, Feb. 10, 1862, Dip. Cor. 1862, 31.

This view evidently is different from that expressed by Mr. Cass, and is not based on any legal effect of the declaration of intention.

"The mere declaration of an intention does not make a person born abroad a citizen. He might change his mind before the arrival of the period for him to take the oath of allegiance, and the law of the United States provides for the interval between the declaration of intention and the final act of naturalization, in order that the person who proposes to become naturalized should have leisure to deliberate on the importance of the proceeding."

Mr. Fish, Sec. of State, to Mr. de Luna, April 22, 1869, 81 Dom. Let. 7.

See, to the same effect, Mr. Fish, Sec. of State, to Mr. Dunbar, April 19, 1869, 80 MS. Dom. Let. 594; to Mr. Bissell, Jan 19, 1870, 83 MS. Dom. Let. 107; to Mr. Bennett, Dec. 24, 1872, 97 MS. Dom. Let. 73; to Mr. Jay, Feb. 2, 1875, MS. Inst. Austria, II. 319.

Also, Mr. Bancroft Davis, Assist. Sec. of State, to Mr. Fox, consul at Trinidad de Cuba, May 12, 1869, S. Ex. Doc. 108, 41 Cong. 2 sess. 202.

The fact that a person dying abroad has made a declaration of intention to become a citizen of the United States affords no basis for action by a consul of the United States in respect of the administration of his estate.

Mr. Evarts, Sec. of State, to Mrs. Blacklock, Sept. 10, 1878, 124 Dom. Let. 293. Continuing, Mr. Evarts said: "It is only when a citizen dies abroad that the law requires a consul to administer on the estate which he may have left in his district, so far as the local law may allow."

"None but citizens can properly claim protection from the Government, and your declaration to become a citizen does not confer upon you that character." (Mr. Evarts, Sec. of State, to Mr. Glendenning, June 7, 1878, 123 MS. Dom. Let. 204.)

"A mere declaration of intention to become a citizen of the United States does not change the nationality of the party making such declaration; he remains until final naturalization a subject or citizen of his origin (*sic*). Consequently such declaration of intention would avail you nothing," for purpose of protection in the country of origin.

Mr. Frelinghuysen, Sec. of State, to Mr. Dunne, July 31, 1883, 147 MS. Dom. Let. 595.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Foster, min. to Spain, April 2, 1883, 146 MS. Dom. Let. 311; to Mr. de Bounder, Belg. Min., April 23, 1883, MS. Notes to Belg. Leg. VII. 311; to Mr. Randall, M. C., March 14, 1884, 150 MS. Dom. Let. 276. In the letter to Mr. Randall, which related to the arrest, on an American merchant vessel at Sagua la Grande, Cuba, of a Spanish subject who had made a declaration of intention, Mr. Frelinghuysen observed: "The case of Koszta differs from this in that the Austrian officers attempted to seize him upon the territory of a third power, not that of his original allegiance." It will be seen, however, that Mr. Marcy's justification of the protection extended by Captain Ingraham to Koszta, even in the territory of a third power, was not based upon the fact that he had made a declaration of intention. *Infra*, § 490.

Certain persons of Russian origin, who had made a declaration of intention in the United States, and who afterwards settled in Palestine, claimed protection as American citizens. It was stated that the Russian consular representative having declared that they had lost their Russian citizenship, the Porte asserted that they must be considered as "Turkish subjects." Mr. Frelinghuysen declined

to admit this claim, observing that the persons in question had acquired by their declaration of intention "a quasi right to protection as against the claim of a third power to their allegiance," and that "we would hold in case of dispute on this point that they retain a future right to perfect their naturalization in conformity with our laws." In a subsequent instruction he said that if the question should arise, the United States would "claim that the person affected shall not be deemed to have become a subject of the Porte until after he shall have had full option" to "complete his naturalization." At the same time Mr. Frelinghuysen admitted that the "declaration of intention is not of itself a renunciation of original allegiance, but simply a record of declared intention to renounce such allegiance on becoming a citizen of the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. Wallace, min. to Turkey, March 25, 1884, and April 8, 1884, For. Rel. 1884, 551, 560.

The foregoing instruction, in connection with which the instructions of Mr. Blaine to Mr. Hicks, in 1890, *infra*, pp. 341-343, should be read, bears date eleven days after the letter of Mr. Frelinghuysen to Mr. Randall, *supra*. Mr. Marcy's position in the Koszta case, as will hereafter be shown, did not in the remotest degree rest upon the strange theory that a person who has merely declared his intention, and therefore has not become a citizen, may acquire an international right to become a citizen by leaving the United States and going to a country other than that of his origin. See, *infra*, §§ 490, 491.

Until a person has perfected his naturalization in due course of law and obtained his final papers, he can not claim the protection of the United States in case of his voluntary return to the country of his origin.

Mr. Bayard, Sec. of State, to Mr. Crain, M. C., Jan. 28, 1886, 158 MS. Dom. Let. 573.

See, also, Mr. Bayard, Sec. of State, to Mr. Bendenli, May 13, 1885, 155 MS. Dom. Let. 364.

A declaration of intention does not entitle a person to be registered as a citizen of the United States by the American consuls in China.

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, April 18, 1887, For. Rel. 1887, 210.

While the United States minister in China might perhaps be justified under some circumstances in using his "good offices" in behalf of a person who had made a declaration of intention, it would seem that such a person, if he was a citizen or subject of a country with which the United States had a formal treaty of naturalization, would be excluded from such action. (Mr. Olney, Sec. of State, to Mr. Denby, min. to China, Jan. 13, 1897, For. Rel. 1896, 92, 93.)

An application was made to the Department of State by a citizen of Philadelphia for a passport for a British subject, who had de-

clared his intention to become a citizen of the United States. Accompanying the application there was a letter from the British consul at Philadelphia, which led the Department of State to say: "Her Britannic Majesty's consul . . . seems to be under the impression that an alien, when making declaration of his intention to become a citizen of the United States, abjures his original allegiance. He does not, however, do so until he appears before the court to perfect the final act of lawful naturalization, to which the first article of the treaty of 1870, between this country and Great Britain, refers. In bringing this matter to your attention it is not intended to raise any question as to the effect of the declarant's act should he quit this country before completing his lawful naturalization and under British protection. That is a matter for the court to adjudicate should he return after such absence and allege that he quitted this country temporarily and *animo reverendi*, without intention to abandon whatever domicil he may have acquired or to interrupt the probationary period of residence."

Mr. Bayard, Sec. of State, to Mr. West, British min., Oct. 17, 1885, MS.  
Notes to Gr. Br. XX. 133.

"I have to acknowledge the receipt of your No. 70 of January 14 last, in which you inclose a copy of a certificate of protection which you have drawn with a view to its issuance to one William Gylling, a Swedish subject who, in 1881, declared his intention to become a citizen of the United States, but never took the subsequent steps necessary for admission to citizenship.

"A comparison of the certificate with your dispatch will disclose a misapprehension in regard to the effect of Mr. Gylling's declaration of intention. It is correctly recited in the certificate that Mr. Gylling 'declared his intention to become a citizen of the United States of America and to renounce forever all allegiance and fidelity to all and any foreign prince, potentate,' etc.

"In your dispatch you say: 'These men [of the class of Mr. Gylling] are in a state which naturally excites their apprehension, having renounced on oath all allegiance to their native land and not having completed the formalities which entitle them to be classed as full citizens of the land of their adoption.'

"This statement embodies a very prevalent misapprehension in regard to the effect of a declaration of intention. That act, as its description indicates, is merely expressive of a purpose and does not have the effect either of naturalization or of expatriation. In the case of Mr. Gylling the case is made doubly clear by the treaty of naturalization between the United States and Sweden and Norway of May 26, 1869. By the first article of that treaty it is expressly provided that 'the declaration of an intention to become a citizen of the

one or the other country has not for either party the effect of citizenship legally acquired.'

"This clause follows the provision in the same article that change of allegiance shall be effected by a 5 years' residence and naturalization.

"The Department is therefore of the opinion that the certificate should not be issued to Mr. Gylling."

Mr. Blaine, Sec. of State, to Mr. Hicks, min. to Peru, Feb. 26, 1890, For. Rel. 1890, 694.

See, to the same effect, Mr. Blaine, Sec. of State, to Mr. Thomas, June 4, 1890, 177 MS. Dom. Let. 641.

"The naturalization laws of the United States are framed upon the theory that there is some connection between residence in a country and the acquisition of a right to its protection. Hence they provide a probationary period during which the applicant, by residence in the land of intended adoption, by acquiring interests therein, by good moral conduct, and by familiarizing himself with, and attaching himself to, its constitutional methods, shall fit himself for a faithful and loyal assumption of the duties of citizenship, and thus, as a member of our free society, support the Government whose protection is in return extended to him. Accordingly, it is required that he shall first make a declaration of intention to become a citizen and afterwards undergo a probation, not only to prepare him for naturalization, but also to test the quality and steadfastness of his purpose before his admission to citizenship.

"The object of the law was to make citizenship a substantial thing, and to require the performance of acts indicative of true faith and allegiance as the condition of its acquisition. The law is so clear on this subject that there does not appear to be room for controversy. And, in further execution of this purpose, it is provided that passports shall not be granted or issued to, or verified for, any other persons than citizens of the United States (Rev. Stats., sec. 4076). It is not easy to discover, therefore, the grounds upon which the privileges of citizenship can be claimed by persons who are not citizens. The conditions of the acquisition of citizenship being clearly stated in the law, the reason by which a person can claim the right of citizenship when he has deliberately omitted to perform the conditions is by no means apparent. Nor is it less difficult to perceive upon what theory a Government can be held bound to protect persons who are not only not its citizens, but who have not exhibited a willingness to live long enough within its jurisdiction to acquire its citizenship. Where a person after making a declaration of intention, instead of remaining in the United States and becoming duly naturalized, abandons the country and remains abroad, it must be inferred that he has also abandoned his intention. Take, for example, the case of

Gylling, out of which the present correspondence has grown. The precise duration of his residence in the United States is not known, but it was evidently short. He made his declaration of intention in 1881, and not long afterwards appears to have left the United States. Almost twice the probationary period required for admission to citizenship after the date of first arrival in the United States has elapsed since he made his declaration; but he has never performed the conditions of naturalization, and consequently has never been admitted as a citizen. Indeed, by going and remaining abroad he continuously disables himself from fulfilling those conditions. To say that such a person is entitled to the protection of the United States is merely to set aside the statutes and discard citizenship altogether as a test of the right to claim protection. Those who refuse to attach themselves to the United States can not complain if this Government does not consider itself bound to exert its power in their behalf. Professions of allegiance, however ardent, have, it is proper to say, little weight where the conduct of the individual refutes them. The Department is at a loss to understand why persons in the position of Mr. Gylling 'naturally look,' as you observe, 'to the American legation for a recognition of their citizenship,' when the piece of paper they carry discloses that they are not American citizens and their conduct shows that they are not endeavoring to become such.

"It is not deemed necessary to enter into the discussion of questions of domicile, or of the rights which may pertain to that status. The present observations are confined to the general class to which your dispatch relates."

Mr. Blaine, Sec. of State, to Mr. Hicks, min. to Peru, May 8, 1890, For. Rel. 1890, 695.

A declaration of intention "has no international value whatever in the event of the declarant returning, as he appears to have done, to his native country."

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 169, Jan. 27, 1896, MS. Inst. Russia, XVII. 406.

See, to the same effect, Mr. Gresham, Sec. of State, to Mr. Berkowitz, June 22, 1893, 192 MS. Dom. Let. 421; to Mr. Mason, Oct. 19, 1893, 194 id. 63; to Mr. Pena, Dec. 20, 1893, id. 604; to Mr. Watrous, Jan. 23, 1895, 200 id. 346.

Mr. Olney, Sec. of State, to Mr. Hargreaver, Sept. 17, 1895, 204 MS. Dom. Let. 653; to Mr. Adadourian, Jan. 7, 1896, 207 id. 47; to Mr. Chandler, Jan. 16, 1896, id. 200.

Mr. Moore, Act. Sec. of State, to Mr. Pashayan, Sept. 9, 1898, 231 MS. Dom. Let. 292; Mr. Adee, Second Asst. Sec. of State, to Mr. Karayannopoulos, Aug. 9, 1897, 220 id. 157.

Under the act of June 8, 1896, making appropriations for deficiencies of the fiscal year, the sum of \$10,000 was paid to the Italian Government, out of humane consideration, and without reference to the question of liability therefor, as "full indemnity to the heirs of three of its subjects who were riotously killed, and to two others who were injured," by lynchers in Colorado.

Of the three who were killed, two had declared their intention to become citizens of the United States, but had not completed their naturalization.

For. Rel. 1895, II. 944-945, 949; For. Rel. 1896, 426.

August 8, 1896, three Italian subjects, named Lorenzo Salardino, Salvatore Arena, and Giuseppe Venturella, were lynched in the jail at Hahnville, Louisiana, while in the custody of the authorities of the law. They were charged with committing or with being concerned in the commission of two murders. On their first incarceration the sheriff, in view of the prevailing excitement, placed an extra guard around the jail, but later, believing that the excitement had subsided, removed the extra guard and left the jail as usual in charge of the jailer. Subsequently, on the night of the 8th of August, an armed mob broke into the jail and committed the lynching. Three other Italians, who were confined in the prison, were not molested. The persons who composed the mob were unknown.

November 27, 1896, Mr. Olney, as Secretary of State, communicated certain facts to the Italian ambassador, with an expression of belief that they would lead to a decided change in the attitude which his Government had previously been disposed to assume. These facts were to the effect that Salardino had lived for 12 years in Louisiana, and had taken part in the civil affairs of the State by voting at elections; that, while measures were taken after his arrest to protect him, the murder which he had committed was peculiarly atrocious and was clearly proved; that Venturella and Arena had also resided in Louisiana for several years and voted at elections, Arena having, as was shown, declared his intention to become a citizen of the United States; that the crime with which they were charged was also peculiarly atrocious and well established; that the attack on the jail was unexpected, and that its success was not due to any negligence or connivance on the part of the authorities; and that although the lynching had been investigated by a grand jury, it had been impossible to obtain information which could lead to the discovery and punishment of the guilty parties. On these grounds it was contended by the United States that the Italians in question were slain not because of their nationality, but because of their apparent participation in atrocious crimes; that there had been no willful denial of justice in

the case, and that there was no reason to suppose that the incident or its result would have been different had the supposed criminals been citizens of the United States. Special stress was, however, laid upon the point that the victims of the lynching were "not Italians temporarily residing in the United States;" that, while they were performing no duties as subjects of Italy and "were successfully evading the burdens of her military service," they were apparently intending to remain in the United States and adopt it as the place of their permanent domicile; that, although a declaration of intention had been found only in the case of Arena, it had doubtless been made by the others, since they could not have voted without proof of oaths to the same effect; and that, "by qualifying and acting as electors they had, according to the constitution and laws of Louisiana, as interpreted by its supreme court, become citizens of that State and eligible to hold office." Under these circumstances the United States, while reserving for the moment its decision in the matter, suggested for the consideration of the Italian Government whether it had "any right or duty of reclamation" as against the United States on account of the persons in question. Pursuing this question further, Mr. Olney said:

"In obtaining indemnity for injuries inflicted upon a citizen the Government presenting the claim is in truth that citizen's agent, and any legal or equitable defense good as against the citizen himself is equally good as against his representative. But an individual who participates in making the laws and electing the officers of one Government must in every just view be held to estop himself from complaining of that Government to any other. In point of principle he is not distinguishable from, but is to be identified with the body politic of which he becomes a member; he may not approve of a particular act of that body, but he contributes to the power which enables it to do any or all acts. As a matter of fact, indeed, his vote may have brought about the very legislation or elected the very officer responsible for the injury of which he complains. The soundness of the position, therefore, that an international reclamation will not lie against a Government when the beneficiary of the claim by taking part in the organization and administration of that Government has in effect given his assent to its proceedings, seems to be supported by every consideration of justice and equity. These considerations, which go to the duty of the Italian Government in the premises, are reenforced by the absence of any real interest on its part. The wrongs done at Iiahnville, on account of which its intercession is asked, were to persons who had abandoned Italian soils and had ceased to be part of the population of the kingdom, and who added nothing to its productive capacity or to its military strength. To intercede as asked, therefore, is to use the credit and prestige and



power of the Italian Government on behalf of persons, or the representatives of persons, whose fate and fortunes were at the time of the infliction of the wrongs complained of no real concern to that Government.

“In bringing the Hahnville cases to the notice of the State Department your excellency has evidently been under the impression that they resemble in all substantial particulars the cases of certain Italians lynched in New Orleans in 1891, and of certain others lynched at Walsenburg, Colo., in 1894. But in the last-named cases there was neither allegation nor proof that the persons killed had ever taken part in the political affairs of a State or of the United States by qualifying as voters and actually voting at elections. In the New Orleans cases, out of the eleven persons of Italian extraction who were lynched, two were American citizens; five had declared their intent to become United States citizens and had voted; of the remaining four, three had neither voted nor declared their intent to become United States citizens, while one had declared such intent, but had not voted. To the four persons last mentioned the representations of your Government and its demands upon the United States through you were expressly limited, as appears by reference to the correspondence on the subject between yourself and the State Department. It is true that the Italian consul at New Orleans, in a note to the district attorney, argued that the Italian Government could rightfully intervene on behalf of the five persons who had declared their intent to become United States citizens and had voted, and that the district attorney in a note to the Attorney-General controverted that view. But no position of the Italian consul, though brought to your notice, was ever adopted by you—it was never discussed between the two Governments. The note announcing your departure from Washington by order of your Government specifies only four Italian subjects on account of whom demands had been made upon this Government, and the incident, when settled, was settled by the payment of a lump sum, the application of which was left wholly to the Italian Government. The result is that the subject to which the attention of the Italian Government is now invited is one upon which the two Governments in their relations to each other stand wholly uncommitted. It is not, therefore, permissible to doubt that the question will be examined and passed upon by each in an enlightened spirit and with a sincere purpose not only to dispose of the particular matter in hand, but to ascertain and fix a just and proper rule for the determination of all like questions hereafter arising.”

Baron Fava, the Italian ambassador, in reply maintained that neither the position and responsibility of the persons murdered, nor

the apparent criminality of the persons lynched, could be considered as important, the question at issue being the application of the fundamental principle of law and justice that the accused were to be considered innocent till found guilty by judicial process. He also affirmed that the evidence showed that the local authorities were guilty of negligence both in failing to protect the prisoners, and in failing to hunt out and prosecute the lynchers. He contended that such proceedings as were taken could "not do otherwise than tend to encourage similar outrages in future." Proceeding then to the question of intervention, Baron Fava said:

"You inform me that the Federal Government, while it reserves its decision on the subject, is inclined to think that there are serious reasons to doubt any right or duty on the part of the Italian Government against that of the United States resulting from the lynching at Hahnville.

"These reasons are the following: That one or perhaps all three of the men lynched had taken out their first naturalization papers (i. e., declared their intention to become naturalized); that all three had voted in the State of Louisiana; that all three had resided uninterruptedly in the aforesaid State without any apparent fixed intention to return to their native country.

"You state these three reasons, and assert that, while the three men lynched did not in any way contribute to the prosperity and wealth of Italy, and while they even avoided obeying the laws relating to military duty, they took an active part in the political life of this country, where, as electors, they had become, according to the constitution and laws of Louisiana, as interpreted by that supreme court, citizens of that State.

"I should extend this communication beyond the limits of a note if I undertook to quote the laws in force here and the opinions of American publicists in support of the principle that naturalization in the United States can not be granted otherwise than by the Federal laws exclusively, and not by State laws. It is not, moreover, for me to remind your excellency, who is so thoroughly versed in legal affairs, of the universally accepted doctrine that 'mere declaration of intention does not confer citizenship.'

"Whatever were the laws of Louisiana on this subject; whether they had taken out their first papers or not; whether they had voted as electors or not, Salardino, Arena, and Venturella were not citizens of the United States. In order to become so they would have had to comply with the provisions of section 2165 of the Revised Statutes, which regulates, uniformly, the concession of naturalization which is granted in the United States by the national legislative power exclusively. I here cite the cases of *Chirac v. Chirac* (2 Wheaton, p.

269), and of *Osborn v. The United States Bank* (3 Wheaton, 267), in which Chief Justice Marshall expressed himself as follows:

“ ‘The power of naturalization, being exclusively in Congress, certainly ought not to be controverted.’

“ This view is fully stated in the legal memorandum which is herewith inclosed. (Inclosure A.) In this paper, after examining the question in the light of the constitution, laws, and jurisprudence of the State of Louisiana, Lawyer Chiapella says:

“ ‘The alien elector has certain privileges in the matter of voting in Louisiana and in a few other States, granted to him in anticipation of a future naturalization which may never ripen into citizenship, and that is all. But he has not yet crossed the Rubicon. He has not been naturalized under the act of Congress. He is still under the allegiance of the foreign Government, and competent to place himself under the ægis of its protection.’

“ The foregoing is sufficient to show that Salardino, Arena, and Venturella, not having met the requirements of the provisions on the subject of naturalization which are contained in the Revised Statutes, had preserved the plentitude of their capacity as Italian subjects, and that, I repeat, in virtue of the laws of the United States. Nevertheless, but in a purely subordinate line, and without prejudice to the incontestable Italian nationality of the three aforesaid individuals, I do not hesitate to enter, with your excellency, upon an examination of the other special points of your note, relative to the status of the lynched persons.

“ It is stated by the special agent of your Department that Salardino, Arena, and Venturella had voted at the political elections in Louisiana; that Arena had taken out his first naturalization papers, while it is to be presumed that the two others had done the same, as they also had presented themselves at the elections; and that all three had definitely fixed their domicile in the United States.

“ I do not know what were the sources of this information; as, however, they are wholly at variance with that furnished the authorities of Louisiana, and with that which I have received from the Italian consulate at New Orleans, I must beg your excellency to inform me: (a) In what registers and under what date the three Italians are inscribed as electors; (b) from which of the five Federal courts of Louisiana Arena had received his first papers; (c) when, and to whom, the three Italians had declared that they had fixed their domicile in the United States. . . .

“ But even if Salardino, Arena, and Venturella had voted at the elections, and even if the laws of Louisiana attached great importance to that fact, how could this affect the well-proved fact that they were not American citizens?

“The first, Salardino, had resided fully twelve years in Louisiana, and even if he voted, he had not taken out either his first or second naturalization papers. Arena, according to the special agent, had only taken out his first papers, and his attempts to become an American citizen had stopped there. Venturella does not appear to have done even this, as the said special agent could not find either his certificate of first declaration or that of Salardino. All three had had time to ask for their first and second papers. Why did they not do so? The mere fact of having voted would not have conferred upon any of the three the right of citizenship, as is amply shown in the inclosed memorandum; and if they voted, they voted illegally, and probably because they had been misled by native politicians in search of voters, legal or illegal.

“But there is more to be said. The four Italians who were lynched at Walsenburg on the 14th of March, 1895, Francesco Ronchietto, Stanislao Vittone, Pietro Giacobino, and Antonio Gobbette, had solemnly declared their intention to become citizens of the United States, and to renounce forever all submission and allegiance to any foreign prince, potentate, state, or sovereignty, and especially the King of Italy, and they all were in possession of their first naturalization papers. Notwithstanding this, and in spite of those solemn declarations, when I informed the Federal Government of the murders which had been committed, Mr. Uhl came to my house and expressed the President's regret for that bloody act, and your honorable predecessor and your excellency yourself, deeply impressed with a sense of the duties which the Government of the Union has assumed toward a friendly power by virtue of treaties, did not raise the slightest objection; you all immediately recognized the Italian nationality of the four victims, and a suitable indemnity, recommended by your Department and by the President, was granted to the bereaved families. In view of this precedent, it can hardly be maintained that the subject to which you have now called my attention is one of those as to which the two Governments are entirely uncommitted.

“And lastly, the fact that the three victims had been in the United States for several years can not be cited as a proof of their deliberate ‘animus manendi.’ If they had not been residing here temporarily, as asserted by your note, they would have sent for their families, whom they had left in Italy, where they had their domicil, and whom they supported from here by their labor, Venturella his wife and seven children, Arena his wife and four-year-old son, and Salardino his old father, who was unable to earn his living. Under these circumstances, and however long and continuous their absence from Italy might have been, it can not be said that they had transferred their domicil to Louisiana, nor had they no intention of

returning to their native land, nor that they were not contributing to the resources and wealth of their own country. They had come here on business; that is to say, to provide by the fruits of their labor for the comfort of their wives, children, and parents, and they were thus contributing to the wealth of the country in which they had their home.

"Nor is the other assertion, that they had withdrawn from military service, correct. By the two affidavits which I have the honor to submit to you (inclosures 5 and 6) the signers declare under oath:

"(a) That Giuseppe Venturella had performed his regular military service in the artillery, and that he landed in the United States with a regular passport in his possession.

"(b) That Salvatore Arena had not performed any military service, because, as an only son, he was enrolled in the third class, and that when he arrived in the United States he was in possession of a regular passport.

"(c) And lastly, that Lorenzo Salardino had never performed any military service, because he, too, as an only son, was enrolled in the third class, and that he came to the United States with a regular Italian passport.

"I can not follow your excellency in the views expressed by you as to a Government demanding indemnity for injuries inflicted upon one of its own subjects, being the agent of said injured subject. In that case the American Government would be, near that of the Sultan, the agent of the missionaries, in behalf of whom it is now demanding indemnities. Every Government owes it to itself to protect, within the bounds of justice, its own subjects, however poor and humble, and it would otherwise lose the respect of civilized nations.

"Referring to the other lynching which occurred in New Orleans in 1891, and which you mention in your note, I must correct a statement contained in that note, which statement is absolutely and entirely incorrect. Of the eleven persons who were victims of that savage slaughter, two were American citizens, four were undoubtedly Italian subjects, and the other five, who had only taken out their first papers, were justly regarded by the royal consul at New Orleans as Italian subjects. By the pure, simple, and unreserved transmission to the Department of State, in my note of March 25, of the report of the said consul, I evidently and impliedly adopted his views on the subject. Otherwise I would have kept his report to myself. In consequence of its having been remarked to me in person at the Department of State that it was possible that those five persons had also taken out their last papers, I requested the consul to make new and closer investigations in the case. As the diplomatic rupture between the two countries occurred a few days afterwards, and as the consul's replies did not reach me in time, I mentioned in

my note of March 31 only the four Italians who were undoubtedly subjects of the King. But still I never had a thought of abandoning the other five if it should be found that they had only their first papers. In fixing the indemnity at \$25,000 the United States Government must, therefore, certainly have admitted that those five persons were Italian subjects, in spite of the fact that they had procured their first naturalization papers.

"I think that I have shown by the foregoing remarks that the particular points in your excellency's note, which I have examined with all sincerity of purpose, are insufficient to induce my Government to desist from taking that just action which is called for by the murder of the Italian subjects at Hahnville; nor can they in any way disprove the incontrovertible fact of the Italian nationality of Arena, Venturella, and Salardino. Besides, this fact was immediately admitted by the judicial authorities of Louisiana themselves, in their report of August 15, and, on the ground of that report, by the Department of State in the telegram sent by it to the governor on the 29th of August. Like the said five persons who were lynched at New Orleans in 1891; like those of 1895 at Walsenburg, Arena, Venturella, and Salardino were Italian subjects. And it was precisely owing to this undoubted personal status of theirs that I had to insist in our interviews—and the high officials who took your place temporarily last summer likewise adhered to them—that 'in dealing with the present case the New Orleans lynching of 1890 and the Colorado murders of 1895 should serve as precedents.'

"In view of the proven Italian nationality of the three subjects of the King who were lynched at Hahnville, I do not see, in conclusion, any other way of arriving at a legal, just, and final settlement of the dispute than that indicated by the treaties, the only one consistent with the dignity of great nations.

"The entire solution of the difficulty is found in the treaty in force between the United States and Italy; and by virtue of the treaty itself, and with the confidence which I have long cherished of the firm resolution of the President and the United States Government to have international agreements strictly observed, I have the honor to again present the request which I have already repeatedly presented to your excellency, that the guilty parties be sought and brought to justice; that steps be taken to prevent the repetition of such atrocious crimes, and that, at the same time, just and adequate compensation be made to the families of the victims."

In a subsequent note, Baron Fava said:

"I did not fail to draw the attention of my Government upon the statement made in your note of November 27 ultimo that the three Italian subjects lynched at Hahnville, La., 'by qualifying and acting

as electors had, according to the constitution and laws of Louisiana as interpreted by its supreme court, become citizens of that State.'

"I premise that even if the three Italians had voted, which is not yet proved, my Government hardly understands that they could become citizens of a State of the Union without being citizens of the United States. The Federal laws having prescribed a uniform rule of naturalization, and the power of naturalization being exclusively in Congress, the Italian Government is entitled to think that the laws of Louisiana, however peculiar they may be in respect to citizenship, can not be recognized by a foreign power. Besides, the very fact that the article 185 of the constitution of Louisiana says that 'any foreigner may vote who has taken out his first papers,' is conclusive proof that any foreigner who does so vote is still an alien.

"Moreover, you are aware, Mr. Secretary of State, that in the early settlement of the Western States of the Union, many of the legislatures expressly granted the right to vote to aliens who had declared their intention to become citizens, and many thousands of such aliens so voted. This was a common practice. It was never pretended, however, that they became citizens until they took out their final papers. The privilege of voting was a mere permission given by the State, which no one claimed created citizenship; on the contrary, the fact expressly appeared that they were not such citizens. Under these circumstances they remained aliens so far as the National Government was concerned, and were entitled to be protected as such aliens.

"The recent cases in Louisiana were not different. The three men lynched were Italian subjects beyond all question. If they voted wrongfully, they were still aliens; if they voted rightfully under the laws of the State while aliens, they lost none of their rights as such aliens under the treaty of the United States with Italy.

"As far as it concerns the suggestion made by you in your aforesaid note whether the Italian Government can or can not consider as its subjects those Italians to whom it is permitted to vote in the States of the Union, allow me to observe that the solution of this question belongs solely to the Italian legislator and to Italian law. As a matter of fact I can add that the Federal Government has always considered and still considers as citizens of the United States the numerous Americans who in Hawaii take a prominent part in the political affairs and vote openly at the elections of those islands.

"I feel confident that the additional considerations which I have now the honor to submit to your enlightened and impartial examination will still better convince you of the ground and the justice of the request I had the occasion to renew by my two recent notes of December 31, 1896, and of the 10th instant, to which I refer."

By the deficiency appropriations act of July 19, 1897, Congress appropriated the sum of \$6,000, to be paid to the Italian Government, as full indemnity "to the heirs of three of its subjects, Salvatore Arena, Giuseppe Venturella, and Lorenzo Salardino."

For the preliminary discussions of the case, see For. Rel. 1896, 396-403, 403-404.

For the discussion of the question of nationality, as above quoted, see Mr. Olney, Sec. of State, to Baron Fava, Italian amb., Nov. 27, 1896, For. Rel. 1896, 407, 410-411; Baron Fava to Mr. Olney, Dec. 31, 1896, and Jan. 27, 1897, For. Rel. 1896, 412, 414-418, 421-422.

For the act of July 19, 1897, see 30 Stat. 105, 106.

## 6. RESIDENCE.

### (1) FIVE YEARS' RULE.

#### § 388.

Rev. Stat., § 2165, providing that the court naturalizing an alien must be satisfied that he has resided in the United States for five years, and within the State where the court is held for one year, does not require the last year of residence before the application for naturalization to be in the State where the application is made, as it is sufficient that applicant has lived for any year in that State.

*Chandler v. Wartman*, 6 N. J. Law J. 301.

The five years' residence required by the statutes means actual residence in the United States; and a person can not be considered "as having been constructively in this country during the past five years merely because he has been in the employment of this Government [i. e., as interpreter, or dragoman, of the American legation at Constantinople] in Turkey during that time. The fiction of extra-territoriality can not be carried to this extent."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Nov. 2, 1893, For. Rel. 1893, 701.

The person in question, Mr. Gargiulo, had made a declaration of intention in the United States, but soon afterwards returned to Turkey in the official capacity above mentioned.

"A constructive residence . . . is held not to answer the requirements of the statute. Your proposed residence in Japan can not, therefore, be made available for naturalization purposes." (Mr. Evarts, Sec. of State, to Mr. de la Camp, July 25, 1877, 119 MS. Dom. Let. 262.)

The process of naturalization must be performed in the United States. (Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 394, 395.) See *supra*, p. 329.

It has been intimated that a sojourn of a native Porto Rican in Porto Rico, after declaration of intention, would not interrupt his resi-



dence in "the United States." (Mr. Hay, Sec. of State, to Mr. Miranda, June 10, 1899, 237 MS. Dom. Let. 466.) The same thing would, however, potentially be true of a transient sojourn anywhere.

"No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

**Meaning of "continued term."**

Rev. Stat., § 2170; act of June 26, 1848, 9 Stat. 240.

This provision is subject to the exceptions noted below.

The phrase "continued term of five years" means "residence in the general legal sense." (Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Prussia, Sept. 20, 1870, MS. Inst. Prussia, XV. 157.)

"Your despatch No. 158 has been received, together with a copy of the correspondence you have had with the Federal Council in relation to Dominie Madini, now residing in Switzerland.

"It appears that he is an Austrian subject by birth, and that after having taken part in the Lombard revolution, in 1848, he came to this country and legally declared his intention to become a citizen of the United States. In the year 1852, and before he had been long enough in this country to be entitled to naturalization, he returned to Europe and settled in Switzerland, where he has since resided, for the alleged purpose of collecting his fortune, which he has some prospect of being able to do, and then he designs to return and reside in the United States.

"Upon this state of facts you interposed in his behalf in order to procure from the Federal Council permission for him to remain in the Canton of Zurich, from which he had received notice to withdraw, and you suggest that a few words from this Department expressing to the Council its concurrence in the view taken in your note to that body on the subject would be of great utility. . . .

"The 12th section of the act of March 3d, 1813, for the regulation of seamen on board the public and private vessels of the United States, provides 'That no person who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States.'

"Under this statute it was held that any absence from the United States, however short, during the five years, even the landing from a steamboat in Canada, would prevent the applicant from obtaining his naturalization. Such an interpretation of it was deemed a hardship, and to deprive the law of this stringent feature, the act of June 26, 1848, was passed, repealing the words 'without being dur-

ing the said five years out of the territory of the United States,' found in the last clause of the section above referred to.

"The law as it now stands, therefore, requires that the applicant in order to be entitled to naturalization must have resided within the United States for the *continued* term of five years next preceding his admission as a citizen. This language wholly excludes the idea that the person may be allowed to go to another country and there make his domicile as long as it may suit his convenience and then return to the United States and avail himself of the time he had previously resided within their territory. . . . By Madini's departure from the United States before he was naturalized, becoming domiciled in another country and entering into business there, he relinquished all the advantages, whatever they might be, which he had gained by his temporary residence in the United States, and placed himself in relation to this Government on a footing with those foreigners who have never been within its territory. From these observations it will be perceived why the Department is unable to comply with your suggestion to express to the Federal Council regret at its declining to aid the interposition of an American legation in a case like that of Dominie Madini."

Mr. Marcy, Sec. of State, to Mr. Fay, No. 37, March 22, 1856, MS. Inst. Switzerland, I. 47.

For the debates on the act of June 26, 1848, see Cong. Globe, Senate, Dec. 14, 1847, and June 18, 1848; House, June 22, 1848: Cong. Globe, 30 Cong. 1 sess. 21, 854. See, also, Moore, Int. Arbitrations, III. 2718.

M. N. was naturalized in the United States Nov. 29, 1875. It appeared that he obtained a passport as a citizen of the United States from the Department of State in 1870 on an application in which he was represented as a native of Pennsylvania, and that soon afterwards he returned to his native country, Switzerland, where, with the exception of one or two brief visits to the United States, he had since resided, engaged in business. From June, 1875, till 1882, he was a member of the municipal council of Chaux de Fonds. It was stated that the tenure of this office was not incompatible with alien status, but it appeared that it required a previous domicile of at least a year. It was held that the facts were incompatible with the continuous residence necessary to naturalization; and that on this ground, as well as on the ground of his action in obtaining a passport in 1870, he was not entitled to the interposition of the United States in respect of his arrest and imprisonment in Switzerland.

Mr. Bayard, Sec. of State, to Mr. Cramer, min. to Switzerland, No. 138, May 6, 1885, MS. Inst. Switz. II. 251; to Mr. Winchester, min. to Switzerland, No. 33, Dec. 28, 1885, *id.* 295; to Mr. Sterne, April 20, 1886, 159 MS. Dom. Let. 674.

“While a resident domicile here would not be interrupted by transient absences *animo revertendi*, yet the establishment during absence from the United States of a domicile in Switzerland, even though temporary, would be in conflict with and annul the American domicile for the purpose of the naturalization statutes.”

Mr. Bayard, Sec. of State, to Mr. Cramer, min. to Switzerland, No. 138, May 6, 1885, MS. Inst. Switz. II. 251.

It was stated in a passport application that the applicant emigrated from Ireland to the United States in May, 1863; that he went to Ireland in the following August; that he returned to the United States in 1865, but again went back to Ireland and was “put in prison there.” The time when he again returned to the United States was not disclosed, but he was naturalized Feb. 21, 1871. The Department of State declined to issue a passport on this application, since the applicant apparently had not resided “five years continuously” in the United States prior to his naturalization.

Mr. Uhl, Act. Sec. of State, to Mr. O'Donovan Rossa, May 2, 1894, 197 MS. Dom. Let. 106.

In the case of a native of Russia, who made a declaration of intention May 29, 1893, and then returned to Russia, where in January, 1896, he still remained, Mr. Olney said his sojourn in Russia “would doubtless be held by a naturalizing court . . . to interrupt the continuous residence required by law as a condition precedent to his naturalization.”

Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 169, Jan. 27, 1896, MS. Inst. Russia, XVII. 406.

“I have to acknowledge the receipt of your dispatch No. 25, of the 17th ultimo, reporting that you have refused to issue a passport to Demetrius Chryssanthides, because he had not resided continuously in the United States during the five years preceding the date on which his certificate of naturalization was granted by the superior court of the city and county of San Francisco.

“In the treaty between the United States and Bavaria concerning naturalization, signed May 26, 1868, Article I. provides that Bavarians who shall become naturalized in the United States, and ‘shall have resided uninterruptedly’ in the United States for five years, shall be treated as American citizens. An explanatory protocol to the treaty says, in paragraph 2 of Article I:

“‘The words “resided uninterruptedly” are obviously to be understood, not of a continual bodily presence, but in the legal sense; and, therefore, a transient absence, a journey, or the like, by no means interrupts the period of five years contemplated by the first article.’ The same explanation appears in the protocol to the naturalization treaty with Württemberg of July 27, 1868. The Department has

never doubted that that explanation would be accepted by the other powers with which the United States has naturalization treaties. (See *The American Passport*, page 175.)

“This is the accepted construction of the words ‘resided uninterruptedly,’ but the law is (sec. 2170, R. S.): ‘No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.’ This is broader than the language of the treaties, and is to be understood in the ordinary legal sense, according to which ‘a transient absence for business, pleasure, or other occasion, with the intention of returning’ (13 *Opinions of the Attorneys-General*, 376) does not interrupt the residence.

“The just rule, it is apprehended, is that suggested by Senator Berrien [in the debate on the law]: “If the applicant is absent any part of the time [during the five years before naturalization] it remains for the court to decide whether that absence is sufficient to prevent the issuing of the certificate.”’ (*American Law Review*, February, 1895; article by Frederick Van Dyne, Assistant Solicitor, Department of State.)

“In the case under consideration, Chryssanthides was absent about five months, three years before his naturalization. Whether or not this was a period long enough to have destroyed his residence was a question for the court before which he applied for naturalization to determine. The presumption is that the court decided properly.

“Upon the showing presented by you the Department is of the opinion that this absence did not by itself furnish sufficient reason for refusing to issue a passport to Chryssanthides. Unless there is more evidence adverse to his good faith than you submit, he should be granted a passport and the adverse memorandum made on his naturalization certificate should, as far as possible, be removed.”

Mr. Hill, acting Sec. of State, to Mr. Leishman, min. to Turkey, June 14, 1901, *For. Rel.* 1901, 520.

For the construction of the clauses as to residence in the treaties, see the discussion of the treaties, below.

## (2) EXCEPTIONS.

### § 389.

An alien seaman, who has duly declared his intention to become a citizen, and who has thereafter served three years on a merchant vessel of the United States, may be admitted to citizenship.

**Seamen.**

*Rev. Stats.* § 2174.

This statute does not include seamen in the Navy. (*Ex parte Gormly*, 14 *Phila.* 211.)

By the act of July 26, 1894, *supra*, § 386, adult seamen in the Navy or Marine Corps, who have served five consecutive years in the Navy or one enlistment in the Marine Corps, may be naturalized.

As heretofore pointed out, service in and honorable discharge from the Army entitle an adult alien to naturalization after one year's residence in the United States.

**Service in Army.**

*Supra*, § 386.

## V. CONVENTIONAL ARRANGEMENTS.

### 1. TREATIES WITH THE GERMAN STATES.

#### (1) NEGOTIATIONS.

#### § 390.

The first naturalization treaty concluded by the United States was that with the North German Confederation, signed at Berlin February 22, 1868. It was negotiated on the part of the United States by George Bancroft. Its acceptance on the part of North Germany may be ascribed largely to the sagacity and good will of Count (afterward Prince) Bismarck.

It was followed by the conclusion of similar treaties with other German States, as follows: Bavaria, May 26, 1868; Baden, July 19, 1868; Würtemberg, July 27, 1868; Hesse, August 1, 1868. All these treaties were negotiated on the part of the United States by Mr. Bancroft.

"You are familiar with the never-ending dispute between this Government and those European governments which claim to exact military service from persons born within their allegiance, but who have become naturalized citizens of the United States. The question is one which seems to have been ripening for very serious discussion when the breaking out of the civil war in this country obliged us to forego every form of debate which was likely to produce hostility or even irritation abroad. It is in our intercourse with Prussia that the question produces the most serious inconveniences.

"Soon after the close of our civil war, Count Bismarck made some offers to the United States which were conceived in a spirit of great liberality. Your predecessor, the lamented Mr. Wright, was hopeful that, through the negotiation thus opened, the two governments might arrive at a satisfactory conclusion of the question. It soon became apparent, however, that the United States could not surrender the principle of the absolute right of expatriation, while on the other hand Prussia was not prepared to acknowledge the principle in its full extent.

"The present attitude of Prussia is one of strength and repose, as is also that of the United States. Prussia might now even derive strength from a concession of the democratic principles upon which we insist.

"I will thank you to look over the records of your legation so as to review your early impressions upon the subject, and thus form for me an opinion whether the discussion can now be reopened with a prospect of success. In that case you will bring the question in the proper way to the attention of Count Bismarck.

"Mr. Yeaman, our indefatigable minister at Copenhagen, has just published there an argument upon the subject. It has so much merit that I have instructed him to send you a copy thereof."

Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, Aug. 22, 1867,  
MS. Inst. Prussia, XIV: 480.

"Your despatch of the 3d of March, No. 47, has been received. The naturalization treaty still remains before the Senate. It meets with some opposition from a class of unnaturalized Germans who prefer to agitate for more rather than to accept what has been agreed upon.

"There is a partial indifference also in the Western States, resulting from the fact that their State constitutions and laws admit a preliminary declaration of intention and eighteen months' residence to qualify the emigrant as a member of the political state. Nevertheless, the prospect for the treaty is favorable. Indeed, the chairman of the Committee of Foreign Affairs in the Senate assured me yesterday that he thought the treaty would be ratified within the next forty-eight hours, an assurance which is very satisfactory, when we consider the other grave occupations with which the Senate is now engaged."

Mr. Seward, Sec. of State, to Mr. Bancroft, min. to Prussia, March 23, 1868, MS. Inst. Prussia, XIV: 508.

For the opinion of Bismarck as to the effect of the treaty, see S. Ex. Doc. 51, 40 Cong. 2 sess.

As to the negotiation of the treaty, see Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, No. 111, July 21, 1875, MS. Inst. Germany, XVI: 76.

By the treaty with the North German Confederation the citizens or subjects of one of the contracting parties "who become" naturalized within the jurisdiction of the other, and who shall have resided therein uninterruptedly for five years, are to be treated as naturalized citizens of the latter. By the treaties with Baden, Württemberg, Bavaria, and Hesse, citizens or subjects who "have" or "shall" become naturalized, and who have so resided, are to be treated as naturalized citizens. It thus appears that, of the treaties mentioned, four "ex-

pressly relate to past acts of naturalization as well as to future ones," while the "most important one is entirely silent as to past acts."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, I. 279, 280.

"I am able to assure the Department that the phrase in which the words 'who become' are used is understood to be a description of persons, and to include past, present, and future." (Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873, For. Rel. 1873, I. 284, 287.)

As to the treaty with Hesse, see Mr. Fish, Sec. of State, to Mr. Mayns, June 13, 1870, 85 MS. Dom. Let. 82.

As to the treaty with Austria-Hungary, see Mr. Fish, Sec. of State, to Mr. Kanders, July 12, 1870, 85 MS. Dom. Let. 282.

As to North Germany, see Mr. Fish, Sec. of State, to Mr. Gietz, Feb. 8, 1871, 88 MS. Dom. Let. 226.

In 1873 the United States proposed a revision of the naturalization treaties, and stated that the extension of the provisions of the treaty with the North German Union to the other States would, in the opinion of the President, be the simplest and best way to solve the question, adding to it such a provision as might be necessary under German laws to enable Germans who had declared their intention to become citizens of the United States, but had not yet become such, to inherit real and personal property in Germany, as well as a provision that the effect of the treaty should extend to all past naturalization. The proposal was declined.

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, I. 279, 281; same to same, June 4, 1873, id. 292, 293.

In a dispatch of May 8, 1873, Mr. Bancroft traces the history of the negotiation of the treaties and expounds their meaning. He says: "I am unable to find in the treaties of naturalization all the defects which are suggested. On the contrary, I think that the most important of them do not exist and that others are of no practical moment."

Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873, For. Rel. 1873, I. 284.

In a dispatch of May 8, 1873, Mr. Bancroft said: "I do not regard it as a misfortune that no treaty provision exists protecting the rights of inheritance of the emigrant, where the citizenship of the one country is lost and that of the other not yet acquired, because this is now exceedingly well regulated by the laws of Germany for Germans. This is proved in the very case of Klatt, where his inheritance was held safely for him by the Prussian functionaries, and when he could not be found, and so could not appoint an agent, an offer was made to pay the property over to an official of the United States." (For. Rel. 1873, I. 289.)

## (2) CONDITIONS OF CHANGE OF ALLEGIANCE.

## § 391.

By the treaty with the North German Confederation, citizens or subjects of the one country who become naturalized citizens of the other, and "shall have resided uninterruptedly" within the latter five years, shall be treated as its naturalized citizens. A similar provision is made in the naturalization treaties with Baden, Bavaria, Hesse, and Württemberg, but in the case of Bavaria, by a protocol signed at the same time as the treaty, it is agreed that the words "resided uninterruptedly" do not mean "a continued bodily presence;" that "a transient absence, a journey, or the like, by no means interrupts the period of five years contemplated by the first article;" and that a five years' residence may indeed not be required where the individual has previously been discharged from his original citizenship. By this protocol "we are bound to a construction of the word 'uninterruptedly' which we have not a right to insist upon" as to the other treaties.

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, I. 279, 280.

"There was no protocol with North Germany, but the treaty was explained in parliament by the North German Union, and the Bavarian negotiator of the Bavarian treaty simply inserted Count Bismarck's words in the Bavarian protocol, making no difference, and intending to make no difference, between the two treaties." (Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873, For. Rel. 1873, I. 284, 287.)

"A person exceptionally naturalized by reason of his service as a soldier, upon proof of one year's residence, is obviously not within the protection of the convention with the North German Union unless he has resided five years within the United States, but in respect to the question of what constitutes residence and when it is to be deemed interrupted, or when he shall be regarded as having renounced his allegiance to the United States, he is to be judged in the same manner as other naturalized citizens."

Mr. Fish, Sec. of State, to Mr. Bancroft, Sept. 20, 1870, MS. Inst. Prussia, XV. 157.

S. was naturalized March 27, 1869. The record recited that he had resided in the United States more than five years. It appeared by his own admissions, made to the American legation in Berlin, that he had not at the time of naturalization resided in the United States five years. The record also recited that he had enlisted in the United States Army in 1865, and had been honorably discharged. In an opinion of January 21, 1871, the Attorney-General said: "This fact [of enlistment and discharge] has no bearing upon the matter



in hand, because naturalization, unless accompanied by a five-years' residence in the adopted country, confers no rights under the treaty.

"Hence I am of opinion that Mr. Stern, though regularly naturalized in the United States, not having had an uninterrupted residence of five years here, is not entitled to the immunities guaranteed by the treaty with North Germany of 1868."

Akerman, At. Gen., 1871, 13 Op. 376, 377. "In that opinion the Department fully concurs, and the minister of the United States at Berlin has been advised accordingly." (Mr. Fish, Sec. of State, to Mr. Strong, M. C., March 7, 1871, 88 MS. Dom. Let. 443; Mr. Fish, Sec. of State, to Mr. Bancroft, Jan. 27, 1871, MS. Inst. Prussia, XV. 195.)

See Williams, At. Gen., 1872, 14 Op. 154; 1873, 14 Op. 295.

The Bancroft treaties require, as conditions of expatriation, both an uninterrupted residence of five years and naturalization. If, therefore, a person be naturalized in the United States in less than five years, as under § 2166, R. S., relating to the naturalization of persons in the military service of the United States, he must, in order to obtain the benefit of the treaty, also complete his five years' residence.

Mr. Adee, Act. Sec. of State, to Mr. Kunze, Aug. 3, 1897, 220 MS. Dom. Let. 38.

But he need not be naturalized again, after the completion of the five years' residence. (Mr. Hay, Sec. of State, to Mr. Stewart, May 10, 1900, 245 MS. Dom. Let. 47.)

Richard Braeg, a native of Baden, was admitted to citizenship of the United States at San Francisco, California, July 19, 1879. In the following year he returned to Europe, and settled on an estate in Switzerland near the German frontier, but conducted a business on the German side of the line at Constance, in Baden, where a prosecution was instituted against him on the charge of having made insulting remarks about the German Emperor and the Grand Duke of Baden at Tivoli, in Switzerland. He was acquitted by the court at Constance on the ground that not being a German he was not answerable for the commission of the offense on foreign soil. An appeal was taken by the state's attorney to the imperial court at Leipzig, where the question was raised as to the defendant's loss of German nationality. It appeared that he had resided in Europe from June, 1874, till April, 1879. The imperial court therefore held that he was not naturalized either in conformity with the treaty between the United States and the North German Union of February 22, 1868, or with that between the United States and Baden of July 19, 1868, the latter recognizing as citizens of the United States citizens of Baden who have resided uninterruptedly within the United States five years and have become citizens of the United

States "before, during, or after that time"—words which are not found in the treaty of February 22, 1868.

Mr. White, min. to Germany, to Mr. Blaine, Sec. of State, No. 233, July 30, 1881, 29 MS. Desp. from Germany.

It is to be observed that sec. 2170 of the Revised Statutes of the United States declares: "No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

It seems that Braeg resided in the United States eight years, from 1866 to 1874, and declared his intention to become a citizen, but left in 1874 without having become naturalized, and established in Baden the business above referred to, his personal residence being just across the line in Switzerland. When he made his journey to the United States in 1879, he was not accompanied by his family, and his business in Baden was duly carried on in his absence. "Without recognizing as binding on this Government," said Mr. Blaine, "the decision of the supreme court at Leipsic, the circumstances attending Mr. Braeg's removals of residence may well be taken as evidence of his voluntary expatriation or renunciation of his American allegiance and citizenship. . . . His whole conduct in the matter bears the marks of fraud. Putting the question therefore on this latter ground, he is not entitled to the protection of this Government, or its interference on his behalf."

Mr. Blaine, Sec. of State, to Mr. Everett, chargé at Berlin, No. 256, Aug. 26, 1881, 17 MS. Inst. Germany, 113.

H. Stein was naturalized in the United States, Nov. 30, 1887. He was a native of Prussia, and emigrated to the United States in 1880. Less than two years later, in March, 1882, he returned to his native place, where he remained till April, 1884, when he went again to the United States. In August, 1888, he again returned to Germany, where, in December, 1890, he was put into the army. With regard to this case, Mr. Blaine said:

"The 1st article of the treaty of 1868 provides that Germans who become naturalized citizens of the United States, 'and shall have resided uninterruptedly in the United States five years,' shall be held to be American citizens and shall be treated as such. This substantially embodies a provision of the laws of the United States on the subject of naturalization. In addition to the reasons existing under the treaty, the foreign office alleges that Stein's behavior in other respects than those mentioned shows that he emigrated solely for the purpose of avoiding the performance of military duty.

"Upon all the facts, you indicate the opinion that Stein's case is not a meritorious one and should not be pressed. Undoubtedly upon the facts stated in the note of the foreign office, the complainant is

not entitled to the interposition of the Government of the United States. Whatever the motive of his return to his native country, it is plain that he never resided uninterruptedly in the United States for five years.

“He first resided less than two years in the United States, and then more than two years in Germany. Afterwards he resided something more than three years in the United States and was naturalized, and then went again to Germany, where he has since resided. Private and domestic reasons do not excuse a failure to comply with the treaty in regard to residence, or with the requirement of the statutes. The period of five years to be spent in this country prior to naturalization is intended as a period of preparation for the duties of citizenship and is of the highest importance. To say that a mere desire or purpose to reside in the United States is all that is necessary if the ties or duties of relationship require the individual to reside in his native country would be to reduce the requirement to an absurdity, for in that case a residence of one day would be as effective as an uninterrupted residence of five years. And to say that an individual had resided here uninterruptedly for five years would not mean that he had actually done so, but that he would have done so if it had been convenient, and that because it was not convenient or practicable he was to be regarded as having done so. If private duties require a man to remain in the land of which he is a citizen or subject, he can not ask to escape the duties of citizenship there, and the Government that would seek to assist him to evade them would be strangely forgetful of the claims it may have upon the allegiance of its own citizens.”

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, No. 233, March 30, 1891, MS. Inst. Germany, XVIII. 438.

(3) QUESTION AS TO ALSACE-LORRAINE.

§ 392.

“When the [German] Empire was formed we had entered into treaties for the regulation of naturalization with the North German Union, with the Grand Duchy of Baden, with the Kingdom of Bavaria, with the Grand Duchy of Hesse as to the citizens of the parts of the Grand Duchy not included in the North German Confederation, and with the Kingdom of Württemberg.

“The first defect in the existing treaties is that they are not coextensive with the limits of the empire. The provisions of none of the existing treaties extend to Alsace and Lorraine, which form an integral part of the empire, and from which there has long been a

large and valuable emigration to the United States, whose status deserves recognition and protection."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, I. 280, expressing the opinion that there should be a revision of the treaties.

As to a protocol signed by Mr. Blaine, Secretary of State, and Mr. von Schlozer, Dec. 2, 1881, but not carried into effect, touching the applicability of the treaties to Alsace-Lorraine, see Mr. Blaine to Mr. Everett, chargé at Berlin, Dec. 5, 1881, MS. Inst. Germany, XVII. 136.

As to the decision of the German Government that the treaty with the North German Union, of Feb. 22, 1868, did not apply to Alsace-Lorraine, and the offer to negotiate for an additional treaty, see For. Rel. 1880, 441, 448, 449.

Mr. Evarts declined to accept a ten years' absence as a basis of negotiation. (For Rel. 1881, 450, 452.)

Charles L. George was born in Alsace, January 9, 1859. It appeared that his father, who was a native of the same province, then belonging to France, emigrated to the United States in 1840 and was naturalized in 1848, but returned to Alsace in 1851 and remained there till May, 1875, when, the son being sixteen years of age, the father came with him to the United States, where they took up their abode and continued to live. May 10, 1884, in anticipation of a visit to Alsace, the son, although he had on coming of age exercised the rights of a citizen of the United States by reason of his father's naturalization, was himself naturalized. On July 12, 1884, he was arrested in Alsace on a judicial prosecution for avoidance of military duty to the German Government and was cast into prison, where he was kept for forty days. When arrested he had on his person 63 marks, of which when he was released 40 were retained, as he was informed, to pay for his board while in prison and his railroad transportation. On his return to the United States he placed the facts before the Department of State, which instructed the legation at Berlin to bring them to the attention of the foreign office with a request for explanations. The Department observed that the case seemed to present certain new points which were at variance with the course that the German authorities were understood to have adopted in dealing with naturalized citizens of other countries whom they found in Alsace or Lorraine. It was inferred, said the Department, from the edict of the *Statthalter* of August 23, 1884, enclosed with Mr. Everett's No. 327, of September 4, 1884, that, if the German Government still adhered to its previous refusal to apply the Bancroft treaty to Alsace-Lorraine, the utmost penalty for foreign citizens was expulsion from the province in case they declined to resume German nationality, and that, if the third article of the edict was correctly interpreted, unmarried foreigners would be allowed to remain during

good behavior, and that, in case they should marry, their children might remain till they reached the military age. There was no suggestion of fine or imprisonment in any case as a penalty for avoidance of military duty by emigration. In this relation the Department referred to the case of Constant Golly, who, although he was charged with an intention to evade military duty, was neither fined nor imprisoned, but was simply told to leave by a certain date.\* Besides, in George's case, said the Department, the grounds were not evident on which the authorities could base a charge of want of good faith on his part, since the time of summons for military service was too far distant when he emigrated.

The case was brought to the attention of the German Government by a note of Mr. Pendleton, then American minister at Berlin, to Count Hatzfeldt, of August 13, 1885. In its reply, which was dated January 22, 1886, the German foreign office, after correcting certain statements which had been made as to the original citizenship of the father, whose original nationality had been represented as German, declared that the father, after his return to Alsace, concealed the fact that he had been naturalized in the United States, and was treated as a French subject, in which character his name stood on the electoral lists from 1857 to 1874, and that when in 1875 he went the second time to America he procured a passport, which was to be effective for two years, from the German authorities. But, said the foreign office, even assuming that the father at the time of George's birth was an American citizen, the son on the transfer of Alsace to Germany became, under the law of June 1, 1870, a German subject.

In a note of February 1, 1886, Mr. Pendleton, in reply to the foreign office, argued that neither the father nor the son was ever a German subject, since, being French by origin, and American by naturalization, they did not take any steps to become German subjects after the acquisition of Alsace by Germany, and that the law of June 1, 1870, could not apply to them, since it related only to the acquisition and loss of German nationality.

March 26, 1886, the German foreign office, replying to Mr. Pendleton's note, stated that all persons born in Alsace-Lorraine, who, according to the French law of 1851, were held to be Frenchmen, became Germans with the cession of the territory, in so far as they did not make valid choice of French nationality under Article II. of the treaty of peace of May 10, 1871.

With reference to this correspondence, Mr. Bayard, in an instruction to Mr. Pendleton of April 27, 1886, said:

"Your dispatches, No. 188 of the 1st of February last, and No. 219 of the 29th ultimo, in relation to the questions which have arisen with

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\* For a report of Golly's case, see *For. Rel.* 1885, 415.

the Imperial Government in relation to the citizenship of Charles L. George, have been received and considered.

"It is an established principle of international law that a child born abroad to a citizen of the United States partakes of his father's nationality, subject, however, to the divesting of this nationality by his election, when he arrives at full age, to accept allegiance to the country of his birth. This right cannot be taken from him either by municipal legislation or by treaty enactments to which the country of his inherited allegiance is not a party. From this it follows that the American citizenship, inherited by Mr. George and elected by him when of full age, cannot be divested either by the municipal laws of Germany or by a treaty between Germany and France.

"It is also a principle of international law that allegiance can be divested by naturalization in a foreign land, and that this prerogative cannot be divested by the municipal legislation of any particular country to which legislation the naturalizing country is not a party. Hence, even if the first position here taken be waived, which it is not, it must be insisted that Mr. George is now a citizen of the United States, not subject to the municipal laws of Germany unless it be shown that he has abandoned his United States citizenship. . . .

"The German foreign office seems to have ignored the American citizenship of Mr. C. L. George as the son of a naturalized citizen of the United States, and to have assumed that having been born in Alsace he became a citizen of France, under the French law of 1851, and therefore was subject to German law as a citizen of Alsace-Lorraine, after its cession to Germany. But under the rules of international law, the son, having been born in Alsace-Lorraine, of an American father, had the option of remaining there until his majority and electing to take the allegiance of his birth, or of claiming the allegiance of his father. It appears, however, that he did not remain in Alsace until he attained his majority. He came to the United States during his minority, and when he arrived at his majority evinced his election of American citizenship by exercising the rights which pertain thereto, and by other acts indicating the same election. Under these circumstances his subsequent taking out of naturalization papers is to be regarded merely as cumulative evidence of his election to take the United States as the country of his allegiance. He was already a citizen of the United States, and was none the less so because he may have entertained unfounded doubts on the subject, as from his conduct would appear to have been the case."

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, July 7, 1885, For. Rel. 1885, 420; Mr. Pendleton to Count Hatzfeldt, Aug. 13, 1885, For. Rel. 1886, 319; Count Bismarck to Mr. Pendleton, Jan. 22, 1886, *id.* 320; Mr. Pendleton to Count Bismarck, Feb. 1, 1886, *id.* 321; Mr. Pendleton to Mr. Bayard, Feb. 1, 1886, *id.* 317; same to same,

March 29, 1886, id. 325; Mr. Bayard to Mr. Pendleton, April 27, 1886, id. 327.

- ( In an instruction to the legation at Berlin, No. 174, December 11, 1886, the Department of State, enclosing a letter from the attorney of C. L. George, stated that the attorney had been advised that he was at liberty to file a claim for damages in case claims of the class in question should ever be made the subject of a demand for indemnity as a whole. The Department also observed that it was assumed that nothing further had been heard from the German foreign office with respect to the case. The legation replied, January 3, 1887, that the discussion on the part of Germany appeared to be closed, and intimated that it would be useless at the moment to press upon the German Government a view of the case different from that which it had taken. (Mr. Pendleton to Mr. Bayard, Nov. 8, 1887, For. Rel. 1887, 402-404.)

“ You state that certain difficulties are, or may be, made by the German Government in the way of recognizing in Germany the validity of such naturalization, and first, that the German Government maintains that the Bancroft treaty, affirming and limiting the rights of Germans naturalized in the United States, does not apply to the district of Alsace-Lorraine. It is true, that in the instruction of Mr. Fish to Mr. Bancroft, April 4, 1873, quoted by you, it was suggested to the German Government that it should assent to a naturalization treaty covering the whole Empire; but this position was taken, not because any doubt existed that the Bancroft treaty was not coextensive in its operation with the Empire, but because an intimation had been given that it would be more consistent with the views then held by the German Government that a new treaty should be executed, and because, in case of such a new treaty, it seemed proper that it should be made expressly to apply to all the newly acquired territory which the German Empire included.

“ So far from this Government acquiescing in the view that the Bancroft treaty did not cover Alsace-Lorraine, Mr. Evarts on December 30, 1882, in reply to a dispatch from Mr. White in Loeb's case, in which an arrest had been made on the basis of such nonapplicability, wrote as follows:

“ ‘ This Department fully approves of Mr. White's action in reference to Mr. Loeb's case, and, moreover, heartily concurs in the view expressed by the minister that this Government can not assent to the doctrine of the nonapplicability of the treaties of 1868 to Alsace-Lorraine. You will therefore continue to discreetly but firmly press Mr. Loeb's case upon the attention of the Imperial German Government until a favorable disposition of it is secured.’

“ As far as I can learn from the records of this Department, the German Government never insisted on final action adverse to citizens of the United States based on the assumption that the Bancroft treaty was not applicable to Alsace-Lorraine.

"It is hardly necessary for me to remind you how serious would be the consequences if such a position should be conceded. The United States, in a case in which the position of the parties in respect to such extension of treaties over the German Empire was reversed, took the ground, in response to the application of Germany, that such extension could not be contested. Thus it was held by Mr. Evarts, as Attorney-General, that as by the formation of the North German Union, after the battle of Sadowa, the entire navy of the union was placed under the command of Prussia, the provisions of the treaty of May 1, 1828, between the United States and Prussia for the arrest of deserters from the public vessels of the respective countries, applied to public vessels sailing under the flag of the North German Union. (Op's Att'ys-General, Vol. XII. pp. 463-467.)

"The United States have never denied the applicability of all treaties executed by them to territories acquired by them subsequent to the date of such treaties. On the hypothesis that territories annexed by a sovereign are not bound by the treaties previously entered into by him, California, annexed by the United States by the treaty with Mexico of 1848, would not be subject to the provisions of the treaty with Prussia of 1828. It is difficult to suppose that Germany would insist on a construction which would divest her, so far as concerns the California coast, of the valuable commercial rights conferred on her by that treaty, and would deprive her consuls at California ports of the important prerogatives which that treaty gives; the very one-sidedness of such a construction discloses its incompatibility with the principles of justice as well as of international law. All the citizens of the United States, with their commerce, would be entitled to the protection of the treaty everywhere in Germany, except in Alsace-Lorraine; but German subjects and German commerce would be equally deprived of the protection of the treaty on our Pacific coast."

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, June 28, 1887, For. Rel. 1887, 394, 395. This instruction related to the claim of Albert Bernhard against the German Government for his arrest and imprisonment at Mülhausen, in Alsace, in 1887, on a charge of participation in seditious conspiracy. On further investigation the Department of State decided that the case should not be pressed for the reason that the facts indicated that Bernhard returned to Alsace *animo manendi*. (For. Rel. 1888, I. 631-635.) It was also ascertained that Bernhard was in 1883 admitted at his own request as an Alsatian to membership in the *Ligue des Patriotes*, a French patriotic organization, on payment of the usual fees, although in April, 1884, his name was erased from the list of members for nonpayment of dues. (For. Rel. 1889, 178.)

"The circumstances of the cession of these provinces as the result of the Franco-German war, invested them with a peculiar and excep-



tional status from the beginning. The war on the German side was waged by Prussia, with the States of the North German Union and the independent Kingdoms as allies. During the interval between the preliminary peace of Versailles and the definitive treaty of peace of Frankfort, by which the cession was made complete, the States theretofore at war with France confederated their political existence as an empire, and it was to this Empire that the French provinces were ceded.

"Alsace and Lorraine had obviously, as stated in a note of Prince von Hohenlohe to Mr. White, August 5, 1880 (Foreign Relations 1880, p. 444), at no time constituted a part of the North German Confederation or belonged to one of the South German States, and therefore did not enter the imperial association as constituents. Their condition was rather that of domanial property in which all the confederated States possessed an undivided interest. It is upon this ground that the German position of nonapplicability of treaties theretofore existing with the North German Confederation or the South German States principally rests.

"The anomalous situation so created could not fail to attract early attention, and by instruction No. 569, April 14, 1873, Mr. Fish called Mr. Bancroft's attention to the circumstances that the existing treaties with the several German States "are not coextensive with the limits of the Empire. The provisions of none of the existing treaties extend to Alsace and Lorraine, which form an integral part of the Empire and from which there has long been a large and valuable emigration to the United States, whose status deserves recognition and protection." Mr. Bancroft was therefore instructed to propose an amendment of the existing naturalization treaties, reducing them to one uniform code of intercourse in that important regard, embracing the whole territory of the new Empire. (Foreign Relations, 1873, p. 280.)

"Mr. Bancroft replied (No. 481, of 1873), discussing the entire question in the various and complex aspects it bore by reason of the existence of five separate treaties of naturalization with the several States subsequently confederated as an empire. Mr. Bancroft's general conclusions were that the existing treaties sufficiently met the cases likely to arise in the several States of the Empire, and especially so as the autonomous reservation of legislative and administrative rights in each State made the disposal of questions of naturalization arising with them dependent upon the *lex loci*, which was not reducible to a common standard throughout the Empire. In the course of that reply Mr. Bancroft said:

"The Department raises the question as to the two provinces of Alsace and Lorraine and I am able to answer that the Government is not disposed to deny to emigrants from those two provinces the

benefits of the treaty with the North German Union, to which I desire to believe they have a right. But on this point I have addressed to the Department a separate letter.' (Foreign Relations, 1873, p. 287.)

"The separate letter thus mentioned is Mr. Bancroft's dispatch, No. 480, of May 8, 1873, reading thus:

"Alsace and Lorraine having been annexed to the German Empire by treaty with France, I hold that the naturalization treaty ratified with the North German Government holds good with regard to both of them, yet as the North German Union was already merged in the German Empire before the cession of the two provinces was completed, it may be better to obtain from the German Government, in some written form that shall perfectly bind the Government, an acknowledgment that the benefits conferred on our adopted German citizens by the naturalization treaties shall equally extend to emigrants from Alsace and Lorraine. If you will permit me to do this, I have no doubt I shall be able to obtain from this Government such a declaration as shall be perfectly satisfactory to all parties interested in the matter.' (Not printed. MS. Dispatches, Germany, Vol. III.)

"Mr. Fish, in reply to these two communications, instruction No. 583, June 4, 1873, repeated his position that a new general treaty for all Germany in place of the several conflicting treaties was desirable, and indeed necessary. While much regretting that the Government at Berlin was not disposed to listen favorably to the suggestion, notwithstanding what Mr. Bancroft had said on the subject, Mr. Fish still thought 'it would be better to remove these differences and to have but one rule for all Germany.' Mr. Bancroft's proposal to procure a temporary declaration from the Imperial Government touching the applicability of the North German treaty to Alsace and Lorraine did not find favor in Mr. Fish's eyes. He said: 'Meanwhile, it is not wise to take any halfway measure as to Alsace and Lorraine.' (Foreign Relations, 1873, p. 293.)

"Here the matter rested until 1880, when renewed correspondence occurred on the subject. In the interval the military cases affecting naturalized Alsatians and Lorrainers had been disposed of in accordance with the provisions of the North German treaty, thereby tacitly admitting its application and virtually applying it to naturalization questions arising in those provinces. In replying to Mr. White's demand for the release of John Schehr, a native of Alsace, Prince Hohenlohe based [his] refusal upon the nonapplicability of any existing treaties between the United States and the German States to the provinces of Alsace and Lorraine, and the consequent subjection of such cases to the local laws of the provinces alone.

"Mr. White replied at considerable length, urging a reconsideration of this decision, in view of the circumstance that the treaty of 1868 had been applied to Alsace and Lorraine and acted upon by both the German and American governments during the whole of the period which had then elapsed since the incorporation of those districts into the Empire. For this note you may consult Mr. White's dispatch No. 146, September 1, 1880. (*Foreign Relations*, 1880, p. 441 et seq.)

"Mr. Evarts approved Mr. White's position by instruction No. 138, October 7, 1880. No definite acquiescence therein appears to have been vouchsafed by the Imperial Government, but thereafter two of the cases then in dispute, those of Aaron Weill and Alois Gehres, were settled by pardon and remission of fine, and in reporting this result Mr. Everett, then chargé d'affaires, in his dispatch No. 4, November 22, 1880, said:

"I venture to think, therefore, with these two cases as precedents, that no further difficulty will be made by the German Government in the settlement of sound cases of returning Alsatians, and that the refusal to extend the benefit of the treaty of 1868—with the North German Union—to Alsace-Lorraine originated in that province and has not been indorsed by the ministry of state in Berlin."

"In 1883 consideration of the question was revived by reason of the agitation then mooted in Congress in favor of a new naturalization treaty between Germany and the United States, aiming to secure for returning naturalized Germans greater or more assured privileges of residence.

"Mr. Sargent, in his dispatch No. 99, January 22, 1883, discussed the general situation and incidentally called attention to the fact that the imperial law of January 8, 1873, specifically extended to Alsace and Lorraine the North German law of June 1, 1870, concerning the acquisition and the loss of confederate or state citizenship. By that law citizenship could be lost only by discharge upon petition, by decree of the authorities, by a ten years' residence abroad, or in virtue of a treaty upon five years' residence accompanied by naturalization abroad. Mr. Sargent thereupon remarked:

"As the five years' clause requires to be vitalized by treaty, and was probably intended as a sanction or affirmation of the American treaties, it would not be of force in Alsace-Lorraine unless the treaties can be held to apply to these late-acquired provinces. But the existence of this feature in the law did not prevent the act of extension of the whole law to Alsace-Lorraine, by which the implication might arise that Germany was ready to extend the treaties." (*Foreign Relations*, 1883, p. 332.)

"The movement toward the negotiation of a new general naturalization treaty with the Empire did not, however, take shape, but as

late as August 23, 1883, the German Government removed the fine and attachment from Xavier Ehret, a naturalized Alsatian, upon whom these penalties had been imposed in his absence.

"In 1887 a case arose affecting one Albert Bernhard, a citizen of the United States, who emigrated from Alsace-Lorraine in 1872. This case was somewhat peculiar, Bernhard having emigrated while the French civil code was still in force in Alsace. When he acquired citizenship, the German law of June 1, 1870, introduced as above stated into Alsace-Lorraine in 1873, prevailed for the inhabitants of those provinces. The German Government contended that Bernhard had not complied with these provisions, having neither obtained a dismissal from his German allegiance nor remained abroad ten years, and that he was therefore to be treated as a German subject. As this contention ignored the five years' treaty clause, the reply of the German Government appeared to assume non-applicability of our North German treaty to Alsace-Lorraine. In an instruction sent by Mr. Bayard to Mr. Pendleton, No. 236, June 28, 1887, Bernhard's case is very fully discussed and incidentally the question of the applicability of the existing Bancroft treaty to Alsace-Lorraine is treated. Mr. Bayard said: [Here follows a long quotation from Mr. Bayard's instruction to Mr. Pendleton, of June 28, 1887, printed *supra*.]

"From this time until the present no formal discussion of the question is found, although in various cases the German assertion of the nonapplicability of the treaties to the annexed Reichsland has been advanced with more or less distinctness. While no overt contestation of that position has been made by this Government, the foregoing review shows that for many years it has withheld formal confirmation of Mr. Fish's apparent admission that the treaties did not so apply. Your present dispatch is the latest and most formal announcement of the German contention. While, on the one hand, it may be said that the attitude of the United States has not been uniform, involving a reversal of the position assumed by Mr. Fish in 1873, it is clear, on the other hand, that until very recently the German attitude has been equally contradictory, the treaties having been virtually applied to Alsace-Lorraine during many years.

"The question has not, however, been formally revived and presented by this Government of late, owing to the prospect of an early incorporation of Alsace and Lorraine into the Empire, either as constituents or as part of the territorial domain of one of the present constituents of the Empire. With such incorporation, of course, the question would find its ready disposition, either by the obvious and incontestable extension of any treaty between such incorporating State and the United States, or by express conventional arrangement which would then become proper and necessary.

"The new ambassador to Germany will, as soon as conveniently practicable after reaching his post, make an examination of the general question, with a view to ascertaining whether the difficulties which Mr. Bancroft discerned in 1873 in the way of negotiating a general treaty of naturalization embracing the whole German Empire still exist, or, if existent, are removable. As to this the Department is unprepared at present to express an opinion. But with regard to the anomalous and peculiar position of Alsace and Lorraine, while still holding, as it must, that no sovereign government can be exempt from existing treaty obligations in respect to territory acquired by it, and believing that it is incumbent upon such sovereign to devise practical methods by which existing treaties may apply to such annexed domain, it is not indisposed to recognize the fact that in practically dealing with the questions involved exceptional difficulties may be found. It is evident, for instance, that existing treaties, even if held applicable to the Reichsland, would not find distinct application in the case of a native of Alsace-Lorraine who had emigrated while those provinces were under French rule, and after acquiring citizenship in the United States might return to them subsequent to their German annexation. So, too, the German position would seem, upon analysis, to be somewhat anomalous in respect to a native of Alsace or Lorraine emigrating and becoming an American citizen and subsequently visiting another State of the Empire with which the United States have positive stipulations in regard to the rights of naturalized subjects.

"This Government can hardly be expected to advance or admit the proposition that our existing treaties of naturalization are not applicable to an Alsatian or Lorrainer in whatever part of Germany he may be found. The German contention is essentially local—based upon the peculiar relation of the annexed territory to the Empire—and rests upon the paramount independence of the laws of Alsace and Lorraine alone in the absence of any convention binding those particular districts. This Government can not be expected to assent to any possible proposition that the local legislation of Alsace and Lorraine is paramount and executable in all the other constituent States of the Empire to the supersession of our treaties with those States. This consideration is not, however, advanced by way of argument or protest, but simply as illustrating some of the difficulties environing the present situation of Alsace-Lorraine, under which that territory seems to have the remarkable status of an independent State, belonging to an Empire, controlled as to its internal affairs by the legislation of the Imperial Parliament and yet not represented therein, nor responsible for its conduct as an independent State toward other powers. As was aptly said by Mr. Bancroft in his dispatch No. 230, June 5, 1871, at the time when the bill was pending in the Imperial

Parliament for establishing a government in the new province of Alsace and Lorraine:

"Under the old German Empire the free States with their domain stood directly under the protection of the Emperor. In theory Alsace and Lorraine form a district belonging neither to Prussia nor to any other of the German States, standing directly not under the King of Prussia, but under the Emperor of Germany. An exact conformity of the old precedents would make of them a republic under the protectorate of the Emperor.' (Foreign Relations, 1871, p. 395.)

"As those provinces now stand and have stood for years, they seem to enjoy a strangely admixed privilege of autonomy, protective control, and international irresponsibility."

Mr. Olney, Sec. of State, to Mr. Jackson, chargé d'affaires ad interim at Berlin, March 3, 1896, For. Rel. 1896, 187.

The foregoing instruction was occasioned by the contention of the German Government in the case of Emil B. Kauffmann, a naturalized citizen of the United States of Alsatian birth, that the Bancroft treaty of February 22, 1868, did not extend to Alsace-Lorraine, and that consequently the question was to be determined by section 21 of the imperial law of June 1, 1870, by which a period of ten years is prescribed for expatriation.

Mr. Jackson, acknowledging, March 21, 1896, the receipt of the foregoing instruction, observed that the treaty of 1828 with Prussia had always been considered by the German Government as applicable to the whole of the Empire, although it was made with but a single State. (For. Rel. 1896, 192.)

"The German Government . . . holds that this treaty [of 1868 with the North German Union] does not extend to Alsace-Lorraine; and it applies to those provinces the North German law of June 1, 1870, concerning the acquisition and the loss of confederate or state citizenship. By that law citizenship can be lost only by discharge upon petition, by decree of the authorities, by a ten years' residence abroad, or in virtue of a treaty upon five years' residence accompanied by naturalization abroad."

Mr. Hay, Sec. of State, to Mr. Smith, Jan. 23, 1899, 234 MS. Dom. Let. 216.

See, to the same effect, Mr. Day, Assist. Sec. of State to Mr. Hassenforder, Sept. 30, 1897, 221 MS. Dom. Let. 253.

"For a full elucidation of the subject of the applicability of the Bancroft treaties to Alsace-Lorraine, I have the honor to refer you to Foreign Relations, 1896, pages 186-192." (Mr. Hay, Sec. of State, to Mr. Alexander, April 10, 1900, 244 MS. Dom. Let. 247.)

See Heintzman's case, For. Rel. 1892, 177, 180, 182.

Casimir Hartmann, in 1897, after arrest for military service, was released on the ground that he had lost his German nationality by more than 10 years' residence abroad. (For. Rel. 1897, 231.)

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The German position was reaffirmed in the case of Jonas Lippmann, whose property was attached for a military fine, but the property was afterwards released on other grounds. (For. Rel. 1897, 232-237.)

The German Government, while maintaining that a native of Alsace did not come within the treaty of 1868, stated that, in view of the interposition of the United States in his behalf, the authorities of Alsace-Lorraine would release him from his allegiance if he would so request and pay a fine imposed on him in the imperial courts at Strasburg in 1895 for evasion of military service. This done, he would be permitted to return to Alsace on a visit. (For. Rel. 1903, 442-444.)

That the German Government still maintains its position with regard to Alsace-Lorraine, and requires the release from nationality in such cases to be made the subject of a petition, see the case of Emil Vibert, For. Rel. 1904, 317 et seq., citing For. Rel. 1897, 230-231, and Mr. Olney to Mr. Jackson, March 3, 1896, For. Rel. 1896, 187, *supra*.

#### (4) PRACTICE OF EXPULSION.

### § 393.

“The undersigned, envoy, etc., of the United States of America, begs to recall the attention of Dr. Busch, under secretary of state, in charge of the imperial foreign office, etc., to the note which the undersigned had the honor to receive from the foreign office under date of December 31, 1884.

*Correspondence of  
1884-1887.*

“The undersigned, in making acknowledgment of its reception, reserved in its contents for the appreciation of his Government.

“While the subject of the note involved the rights of American-born sons whose German-born fathers had during their minority returned with them to Germany to reside permanently, a declaration is added respecting the nationality of the father, which seems to have been made without a sufficient consideration of the language of the treaty of 1868.

“That declaration is understood as follows:

“‘As regards the fathers of such sons, no doubt can exist that they are to be regarded as having renounced their naturalization by a longer sojourn than one of two years, pursuant to the treaties regulating nationality of 1868, concluded with the United States.’

“The Government of the undersigned cannot find the reasons which would justify its concurrence in this view.

“In its judgment the treaty cannot of itself convert an American citizen into a German, nor a German into an American, against his will. Even the renunciation of one citizenship does not of itself create another.

“It does not profess to make provision for a resumption of a citizenship previously lost or renounced. Its object was rather to recog-

nize the obligation of a new citizenship which had been lawfully acquired in the other country.

"The fourth article of the treaty of 1868, in its first clause, it is true, recognizes the renunciation of the newly acquired citizenship by a total abandonment of the intention to return to the country where his new citizenship was acquired. But it does not affirm the restoration of the original allegiance. On the other hand, there are many naturalized Americans who reside for more than two years in Germany with the constant intent to return to the United States. They often carry on a business in both countries, beneficially increasing the commercial relations between the two.

"These persons, however long residing in the original country, with the intent of later returning to the adopted country, have always been regarded by the United States as being still citizens of the country which they adopted. And such an interpretation, it is supposed, had received the acquiescence of the German Government, in view of the optional language of the third clause of the fourth article, which employs a different expression from that of the first clause. Such a practical construction has been one of the most beneficial results of the treaty. For it has served to cultivate the relation of commerce and friendship between the two countries.

"The Government of the United States receives with satisfaction the opinion declared by the German Imperial Government which recognizes that the American children of parents naturalized in the United States have an unconditional and durable American citizenship.

"On the other hand, it learns with regret that the Imperial Government regards itself as justified by international principles in refusing the sojourn in Germany of these native-born American citizens, although they are, as such, obedient to the laws and ordinances there prevailing. In these cases it is only a question of native citizens of the United States. There can be no distinction as to them based on national birth of the parents. Such children are not within the provisions of the treaty of 1868. This refusal of the right of peaceful sojourn, therefore, seems to the American Government to be in contravention of the spirit and even the letter of other treaties.

"Thus, by the first article of the treaty of 1828 with Prussia, it is provided that the inhabitants of the respective states 'shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy to that effect the same security and protection as natives of the country wherein they reside, on condition of submitting to the laws and ordinances there prevailing.'

"It can hardly be expected that the United States Government can acquiesce in a rule which, by administrative order, in either country,



creates a class of residents who, while equally under the protection of treaties, may be summarily expelled from the country where they are residing in peaceful pursuit of their avocations and in obedience to all the laws.

"If my Government rightly understands the scope of the principle claimed by Dr. Busch to be a principle of international law, it asserts, in effect, that any native citizen of the United States, sojourning in Germany for pleasure, for business, for study, or for whatever purpose, may be expelled when the 'circumstances indicate that the persons in question use their American citizenship only for the purpose of withdrawing themselves from the duties, and particularly from the military duty devolving upon the domestic population, without being disposed to abandon their permanent sojourn in Germany and the advantages connected therewith.'

"How can such a rule be applied to admitted aliens, aliens even by birth? They are not withdrawing themselves from any duty of military service, because as aliens they owe no such duty. There can be no offense to public order in the nonperformance of a service which neither the local law nor the law of nations imposes.

"No ground is perceived by my Government which will justify a separation of such a class of residents from those intended to be protected by the language of the treaty above referred to. The suggested use of American citizenship is precisely one of the uses assigned to it by the law of nations, namely, the exemption from foreign military service. Can this fact, then, be inquired into as a motive of residence, and be construed into an offense for which a foreign resident may be withdrawn from treaty protection and refused the right of sojourn?

"The undersigned is instructed to present these views to the just consideration of his Imperial Majesty's Government, in the hope that they will lead to a common understanding of the rights of the citizens of each country peacefully residing in the other."

Mr. Kasson, min. to Germany, to the German foreign office, Feb. 25, 1885,  
For. Rel. 1885, 405-406.

"From the note of Mr. Kasson, dated February 25 last, the undersigned understands that the Government of the United States has raised a series of objections against the justice of those decisions which have been arrived at by the Government of His Majesty the Emperor, with respect to former subjects of the Empire who have returned to Germany after naturalization and a sojourn of five years in America, as well as respecting the sons born in the United States of such subjects.

"After having considered the contents of the note referred to with an attention corresponding with the importance of the subject, the undersigned, to his regret, does not find himself in a position in

which he is able to hold out a prospect of a change in the decisions in question. The expositions contained in the note of the 25th of February are directed primarily against the remark contained in the note of the foreign office of December 31 last, which reads:

“As regards the fathers of such sons, no doubt can exist that they are to be regarded as having renounced their naturalization by a longer sojourn than one or two years, pursuant to the treaties regulating nationality of 1868 concluded with the United States.’

“In order to show the untenable nature of the position indicated by these words the envoy argues that article 4 of the treaties could, obviously, in case of the loss of the nationality acquired by naturalization, not have the effect of restoring at the same time the former nationality of the person in question. Such a really untenable assumption was, however, not expressed in the words which have been cited of the note of the foreign office.

“The Government of His Majesty the Emperor is of the opinion rather that the persons to whom the conditions of article 4 of the treaties apply are to be reckoned neither as American citizens nor as subjects of the Empire, but as individuals without nationality.

“Former subjects of the Empire who are in this case are, however, not dispensed from military duty in Germany. On the contrary, they are subject to this duty under the more particular provisions contained in section 11 of the imperial military law of May 2, 1874. (Imperial Laws, p. 45.) Further, the envoy attaches weight to the optional language of the third clause of article 4 of the treaties, where it is said that the renunciation of the naturalization *may* be held to exist when the person resides more than two years in the country.

“As far as the undersigned can perceive, the meaning of that expression is the following: In general the *permanent* transfer of sojourn to the land of the former nationality without the intention of returning to the country of adoption is intended to entail the consequence that the person is to be regarded as renouncing the naturalization acquired in the other country. In view, however, of the difficulty of proving in every particular case that the settlement (*niederlassung*) has taken place without the intention to return, and because an inward (mental) operation of this sort can only be deduced from outward circumstances which may be susceptible to varied interpretation, it has been agreed that the fact of a sojourn prolonged beyond the period of two years shall be sufficient to give to each of the treaty-concluding parties the formal right to treat the person as having renounced the nationality acquired by naturalization.

“For the rest, the foreign office, in the words cited from its note of December 31 last, did not mean to intimate that on the German side this right would be exercised in all cases without distinction. The

Government of the United States may rather rest assured that the German authorities, in the application of that treaty right, will, as heretofore (already), allow all reasonable consideration to prevail.

“As regards the sons born in America of such former German subjects who sojourn with their fathers, the envoy represents that the contemplated adoption of measures of expulsion against such persons would not be in harmony with the provision of Article I. of the treaty of the year 1828, concluded between Prussia and the United States.

“Provisions such as the one referred to are to be found in the majority of the treaties of amity and commerce now in force. But in the intercourse of the Empire with other states the view has been heretofore always and quite universally adhered to that by treaty provisions of this character the internationally recognized right of every state to remove foreigners from its territory when their further sojourn in the country appears to be undesirable, upon grounds of the welfare of the state, is not abolished.

“This applies in a peculiar measure to the sons born in America of former German subjects when they live with their fathers permanently in Germany, participate like Germans in all arrangements for the protection and welfare of the subjects of the Empire, and only make use of their American citizenship to avoid the fulfillment of one of the most important duties of German subjects.

“Continued toleration of such endeavors would necessarily lead to the formation within the Empire of a numerous group of population who illustrate by their example how it is possible, under the covering mantle of a foreign nationality, held by name only, to evade in a whole succession of generations the military duty imposed upon all.

“In this connection the undersigned permits himself to point to the fact that His Majesty's Government has, only after repeated consideration, and after overcoming many scruples which suggested themselves, decided still to recognize the American nationality of the sons in question of former subjects of the Empire, even, also, when their fathers have lost the citizenship acquired in the United States. For the recognition of such a relation is in conflict with the legal view underlying the legislation of the Empire, pursuant to which minor children, standing under paternal control, share the nationality of the father. In order, however, to pave the way for an amicable solution of the existing difficulties, the Government of His Majesty has suppressed the scruples, and has not hesitated to give expression to that recognition.

“It will, therefore, be found the less surprising if this Government, on the other hand, can not renounce the right nor withdraw from the duty of making provision against the injury to an important and just interest of the Empire that may possibly result from such accommodating action, by adopting measures of expulsion against the sons in

question of former subjects of the Empire, under the conditions stated in the note of the foreign office of December 31 last.

"While the undersigned submits the foregoing to the chargé d'affaires, in order that it may, if desired, be brought to the knowledge of the Government of the United States, he at the same time avails," etc.

Count Hatzfeldt, Imp. sec. for for. aff., to Mr. Coleman, chargé d'aff. ad int. at Berlin, May 16, 1885, For. Rel. 1885, 417. Cited in For. Rel. 1897, 228.

Aug. 22, 1884, Mr. Everett, American chargé, laid before Count Hatzfeldt the case of David Lemberger, who had been ordered by the authorities of Wurtemberg, where he was residing, to appear for military duty. Mr. Everett stated that Lemberger was born in the United States in 1862, and that his father was admitted to American citizenship in 1860. Count Hatzfeldt replied, April 26, 1885, that Lemberger had been stricken from the military rolls, it having been ascertained that he could not be considered a German subject. June 3, 1885, however, Mr. Pendleton, then American minister at Berlin, wrote to Count Hatzfeldt that the Wurtemberg authorities had ordered Lemberger within a certain time to accept German allegiance or else to depart. Count Hatzfeldt replied, July 11, 1885, that the measure could not be withdrawn, since Lemberger "belonged to the class of persons who employ their foreign allegiance simply for the purpose of evading military service in Germany," and to whom the principles set forth in the note of May 16, *supra*, applied. On receiving this correspondence, Mr. Bayard, Aug. 1, 1885, wrote to Mr. Pendleton, saying: "It is noticed that Count Hatzfeldt bases his decision to expel Lemberger on the note from the foreign office to the legation of the 16th instant, which discusses the status of the sons of former subjects of the Empire who have returned to Germany after naturalization, and therefore, to meet his arguments, it will be necessary to show that Lemberger's father did not return to Germany after naturalization. This fact does not appear in any of the correspondence forwarded with your dispatch, but may possibly be susceptible of proof from your correspondence with Lemberger himself or the consul at Stuttgart." Aug. 31, 1885, Mr. Pendleton informed Mr. Bayard that the fact that the father had returned to and resided in Wurtemberg was known to the legation when Count Hatzfeldt's note of July 11 was received, and had "precluded the reply which occurred to the Secretary of State, and would have been very pertinent had the fact been otherwise." At the same time Mr. Pendleton communicated to Mr. Bayard a translation of a letter from Lemberger, sr., as follows: "I came with my family in 1870 to Wurtemberg, and returned to America without them in 1874, where I staid for about fifteen months, returning here again, where I have since lived, in 1875. My son has not yet obtained German allegiance. I have been looking about me to see where it could be obtained most cheaply. I was at Münster, Oberamt, and Cannstadt, where my son has been promised citizenship when the matter shall have been decided by the Imperial office. My son is still here with his parents." The case was not further pressed. (For. Rel. 1885, 423-425, 426, 427, 429, 436.)

"The undersigned has had the honor to receive the note dated December 24th last, foreign office, No. 143, relating to the expulsion of several American citizens from Prussia, of the envoy extraordinary and minister plenipotentiary of the United States of America, Mr. Pendleton, and to give to the statements contained in the same an attentive appreciation. To his regret the undersigned is not able to adopt in all points the views expressed by the envoy, and has only found it possible to request the appropriate Royal Prussian authority to grant to Meinert Boysen (Simon Meinert Boysen), who seemed worthy of special consideration, permission to sojourn in Prussia until the beginning of next summer.

"In the note of the undersigned of the 21st of December last, it was already pointed out that the refusal of the permission in question was based on the consideration of the particular circumstances under which the nine persons concerned left their native land and have now returned to it. The Prussian authorities are convinced that all of those persons emigrated solely for the purpose of withdrawing themselves from the performance of military duty. If such persons were permitted, after they have acquired American citizenship, and while appealing to this change of nationality, to sojourn again, according to their pleasure, unhindered, for a shorter or longer period, in their native land, furtherance would thereby be given to similar endeavors, and respect for those laws would be endangered upon which is based the general liability to military service, one of the most essential and important foundations of our state life. Solely on this account, and not as a sort of punishment for evasion of military duty, has the expulsion of those persons been decreed, after a period of sojourn amply sufficient under the circumstances had been accorded them.

"The envoy has advanced the question whether the right of the Prussian government to expel American citizens has not been restricted by the treaty regulating nationality of the year 1868, and earlier by the treaty of commerce and navigation, of May 1, 1828, between Prussia and the United States. So far as the last-named treaty is concerned, considering it first, Article I. of the same provides that the citizens of either state shall be at liberty to sojourn in the territory of the other state, in order to attend to their affairs there, and that they shall enjoy for that purpose the same protection as the citizens of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

"Heretofore the foreign office has pointed out, in the note of Count Hatzfeldt of May 16 last, that, in conformity with the view heretofore generally entertained in intercourse between the Empire and Prussia and other states, and contested from no quarter, provisions of this character by no means conflict with the right of every inde-

pendent state to expel foreigners from its territory when such course is considered requisite upon grounds of the welfare of the state or of the public order.

“Nor do the treaties regulating nationality of the year 1868 conflict with the exercise of this right.

“Under Figure III., No. 1, of the final protocol of the Bavarian-American treaty, which agrees in all essential points with the treaty between the North German Confederation and the United States, this is distinctly recognized, and thereby the North German-American treaty, concluded at an earlier date, has, in a certain manner, received an authentic interpretation. Germans naturalized in America, who have resided five years in the United States, are, it is true, in accordance therewith to be regarded as Americans, and are also to be treated as such in case of their return to Germany, in so far as they have not, in accordance with Article IV. of the treaties, renounced the naturalization acquired in the United States. They may, however, nevertheless, when the accompanying circumstances require, be expelled like any other foreigner. On principle this right will be considered [exercised] only when maturely considered grounds of the public welfare compel.

“The envoy may rest assured that the Royal Prussian government has been actuated solely by considerations of this character in the action it has taken with respect to the persons in question.”

Count H. v. Bismarck, Imp. sec. for for. aff., to Mr. Pendleton, mln. to Germany, Jan. 6, 1886, For. Rel. 1886, 316.

“The doctrine now laid down by the foreign office seems to embody two propositions. The German Government appears to claim, first, that any American, whether he be native or naturalized, may be expelled from Germany whenever, in the opinion of the authorities, the welfare of the state demands it; and, second, that a good and sufficient ground for such expulsion is to be found in the purpose on the part of an emigrant to avoid military duty by emigration, the sufficient proof of which purpose for the German Government is the fact that the emigrant demanded an official permit to leave his native land.

“I will now examine these two points in turn.

“The claim made by the German Government of a general right of expulsion raises the question of what rights of sojourn naturalized Americans have under the treaty of 1868. Article I. of that treaty reads as follows:

“Citizens of the North German Confederation, who have become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such,

"This appears to be the only sentence in the treaty relating to the status of naturalized American citizens pending the two-years' stay which is referred to in the fourth article of the treaty, and we must, therefore, turn to our treaty with Prussia of 1828, which is still operative, for a definition of the status and treatment of American citizens. Article I. of that treaty says:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation.

"The inhabitants of their respective States shall mutually have liberty to enter the ports, places, and rivers of the territories of each party wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing.

"There would seem to be no question that under the concurrent effect of these two treaties, Americans, both native and naturalized, should have a free and equal right of peaceable sojourn in Germany if they submit to the laws.

"I notice the statement of Count Bismarck in his note to you of the 6th of last January, inclosed in your No. 154, of January 18, 1886, and in reply to your note to him of December 24, 1885, that the provisions of the treaty of 1828 do not conflict with the right of every independent state to expel foreigners from its territory when such course is considered requisite upon grounds of the welfare of the state, or of the public order, and that the treaties of 1868 regulating nationality do not conflict with this, and that returning emigrants, even when recognized as naturalized Americans, may, when the accompanying circumstances require, be expelled like any other foreigner, but that on principle this right will be invoked only when maturely considered grounds of the public welfare compel. This opinion, which would seem to put our relations with Germany as regards naturalized Americans on exactly the same footing as they were before the Bancroft treaty of 1868, and to open the door to the same endless and unsatisfactory discussions as then took place, does not, therefore, meet with the assent of this Government. . . .

"The only question which it seems to this Government can be raised as to the right of Americans under our two treaties to remain in Germany would be of how long a period of time is covered by that right in the case of naturalized Americans; and, to decide this, reference to the fourth clause of the treaty of 1868 is necessary.

"Now, it would seem to be impossible to apply the *prima facie* test of an intent to renounce American citizenship as provided for in the last clause of that article, namely, a residence in Germany of over two years, if the returning emigrant is liable to be expelled, as is now proposed, before the expiration of the two years, and no right is reserved

in the treaty to the German Government to decide what period less than two years is sufficient, as Count Bismarck intimates, to attend to their affairs. This 'intent' to renounce American nationality may, it is true, be expressed in some other way than a stay of over two years, and this not infrequently is the case, as is shown by dispatches from your legation reporting cases of deliberate and voluntary resumption of German allegiance on the part of naturalized Americans returning to their native land; but this Government contends that in the absence of any such voluntary and express manifestation of intent to renounce American citizenship, our citizens can, under the treaty of 1868, claim recognition of their status and all rights of sojourn pertaining thereto during the first two years following their arrival in Germany. . . .

"That the intention of the German Government at the time of the signing of the treaty coincided with the views of this Government, as above expressed, appears clearly from the words of the decrees from the ministries of justice and the interior issued on the 6th of July, 1868, to all royal courts of appeal, supreme courts, state attorneys-general; to all the governments of the monarchy; to the chief president at Hanover, and to the presidency of police in Berlin, for their guidance and distribution. These provide—

"That the punishment incurred by punishable emigration is not to be brought into execution on occasion of a return of the emigrant to his original country if the returning emigrant has obtained naturalization in the other country, in conformity to the first article of the said treaty. Also:

"In conformity to article 2 of this treaty, the punishable action committed by the unauthorized emigration of a citizen of the United States of America should not be made the ground of a penal prosecution upon the return of such person to his former country after absence of not less than five years, etc.

"The Royal Government is therefore instructed in such cases to abstain from recommending trial and punishment, and in general from *every kind of prosecution* whenever the person in question is able to produce proof that he has become a naturalized citizen of the United States of America in conformity with the first clause of Article I.

"Yet, notwithstanding these edicts, the proceedings and sentences against returning Americans appear to emanate from the local authorities in disregard of their instructions 'to report officially the remission by way of grace of the declared punishments and costs,' the possibility of condemnation and execution of the penalties not being apparently in any case contemplated by these decrees. These orders are entirely pertinent to the present discussion, although they may be admitted to have more especial reference to military fines for nonperformance of military duty, with a term of imprisonment in default of payment, the greater number of which are eventually repaid after the cases have been brought to the notice of the foreign



office by your legation. . . . Certainly peremptory expulsion at three weeks' notice may be fairly included under the term 'in general from every kind of prosecution,' for expulsion is evidently a worse punishment than the ordinary fine, after the emigrant has incurred all the expense of a return to his native land, under the supposed protection of a treaty to remain there undisturbed for at least two years. . . .

"This brings me to the second point made by the German Government for its refusal to rescind the orders of the local authorities, namely, that the application or request of these young men of sixteen years for permission to emigrate *before attaining the age of military liability* appears to justify the assumption that in seeking the discharge from Prussian allegiance, which the application apparently involved, *they were actuated solely* by the purpose of withdrawing themselves from the performance of the general military duty in Prussia.

"The minister of the interior on the 6th July, 1868, in his circular says:

"In concluding the treaty of the 22d February of this year between the North German Confederation and the United States of America *it was the prevailing intention* that in conformity to art. 2 of this treaty the punishable action committed by the unauthorized emigration of a citizen of the Confederation to the United States of America *should not be made the ground for a penal prosecution* upon the return of such person to his former country after absence of not less than five years, and that the punishment for such action, even though already declared, *should not be consummated* if the person has acquired in America the right to citizenship in conformity to Article I. of said treaty.

"The circular of the minister of justice is to the same effect, and in almost the same words. It seems to be a self-condemned proposition, whose refutation is contained in its statement that, if the punishment for unauthorized emigration was in every case to be remitted, authorized emigration was to be a punishable offense, and yet this is what the German Government asserts.

"Nor is it apparently quite logical to state (see Count Bismarck's note of December 21, 1885, transmitted in your No. 142) that the discharge from Prussian nationality could not lawfully be refused in time of peace to persons who have not yet reached the age of military liability (that is, the completion of the seventeenth year), and yet to say: 'The assumption seems therefore to be well founded that the persons in question (all under seventeen) sought discharge from their native allegiance, and emigrated to the United States only for the purpose of withdrawing themselves from all performance of military duty in Germany, and the same purpose must be assumed in the cases of H. P. Jessen, H. F. N. Rohlfs, and C. H. E. Rohlfs' (though these three were over seventeen years of age, and therefore might

have been refused permission), 'because these three persons emigrated to the United States after attaining the military age, without permission, and without having responded to the duty of presenting themselves for military service.' . . .

"This Government has always in its consideration of these cases proceeded upon the supposition, which has thus far not been contradicted by the foreign office, that the military liability, *the avoidance of which was culpable and punishable*, did not begin until the age of military service, which is given in the German constitution as the completion of the twentieth year, and when a recruit is sworn into the service under the flag and assigned to a regiment. A disregard of this liability is understood to be desertion, and as such never defended by this Government.

"But whatever may be the age of military liability, the circular <sup>a</sup> of the minister of justice, issued in pursuance of the treaty, says, '*The punishment incurred by punishable emigration is not to be brought into execution on the return of an emigrant who has obtained naturalization in the other country,*' and this decision is given in execution of the treaty in which no distinction is made between those who emigrate before or after the age of military liability, excepting only those persons referred to in article 2, understood to be deserters.

"It seems unreasonable on the part of the German Government to grant a request to emigrate which carries with it necessarily a release from military duty whether the applicant asks for such release or not, and then years after this permission has been availed of to violate and invalidate its own permit, and impute motives to the emigrant which could have had no effect when applying for the permit, inasmuch as the authorities are obliged by law to grant it. But there surely ought to be a just and reasonable distinction drawn between the acts and intent of a mere lad of sixteen emigrating, and usually in obedience to his parents, and those of a young man of twenty who may have received his summons to appear, and hastens to escape from the country in order to evade its laws. Out of the thirteen persons expelled from Schleswig-Holstein since the 1st December, 1885, eleven were under eighteen years of age, and nine, who were under seventeen, had permits to emigrate.

"The complaint by the German authorities has appeared heretofore to be not so much of the fact of emigration, whether with or without permission, as of the return to Germany after naturalization and by acts and words inciting the embryo recruits in their native villages to discontent and emigration.

"But even as regards this species of offense, which is more legitimate in its basis than the one alleged in the Schleswig-Holstein cases,

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<sup>a</sup> Printed Foreign Relations, 1868, Part II., p. 55.

great allowance should be made for the difference in popular habits and customs between America and Germany. In this country the emigrant travels freely and frequently. The sedate German becomes more active and migratory, and his proverbial and innate love for his fatherland naturally tempts him on acquiring his new nationality to return as often as possible to the home of his childhood from which he has been long absent. It was in contemplation of and to meet this feeling and this necessity, which it would be unwise and contrary to the instincts of humanity to ignore, that the treaty was made. The returning emigrants do not enter Germany as Germans seeking to evade military service, but as American citizens carrying the proofs of their naturalization as required by the treaty, and generally with a passport recognizing them as American citizens, and claiming for them protection as such. How much more favorably then should their cases be considered, when they hold a discharge by German authority from their original military obligations and a permit to emigrate to foreign lands.

“This Government considers that it has a right to ask that these passports and naturalization certificates shall be respected by the German authorities, and that the right to unmolested sojourn of returning naturalized German-Americans whose papers are evidence that they have complied with the United States laws and the provisions of the treaty of 1868 in regard to change of nationality, shall be acknowledged and respected, and that if a continuous residence in Germany of two years may be held to imply a renunciation of American allegiance no such implication shall arise in any shorter period, excepting in cases where the intent to reassume German nationality shall have been expressed explicitly by the returning emigrant. Consequently, during the said stipulated period of two years the naturalized American is entitled to protection from molestation or expulsion as long as he submits himself to the laws of Germany. The recent course of Germany in expelling a number of naturalized American citizens, whose quiet and inoffensive character was officially testified to, is considered contrary to treaty provisions, and as affecting the rights of a large class of our citizens who are not included in the special exceptions stipulated for in article 3 of the treaty of 1868 regarding criminals and fugitives from justice.

“You are therefore instructed to present these views to the German Government, requesting at the same time that it will reconsider its decision in the recent cases of expulsion (and which I must believe to have been inadvertently made) in the light of the above recitals. The general doctrine of the right of a nation to expel obnoxious foreigners; whose presence is dangerous to its peace and welfare, from its shores, is well known to this Government, and by none more readily acknowledged, but this right was not lost sight of in framing

the treaty of 1868, and while the right is admitted, yet its particular application as regards naturalized Americans is considered in and limited by that treaty.

“You may read this instruction to the minister of foreign affairs and furnish him with a copy of the same for his information.”

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, March 12, 1886, *For. Rel.* 1887, 369.

See, as to the case of Hans Peter Jessen, above mentioned, Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, No. 91, Jan. 29, 1886, *MS. Inst. Germany*, XVII. 589.

The foregoing instruction of March 12, 1886, related to numerous cases of expulsion in 1885-7, from the island of Föhr, Schleswig-Holstein, of young men, naturalized citizens of the United States, of German origin, shortly after their return to their native place. See *For. Rel.* 1886, 310, 311-315, 323.

For a reference to the decision of the German Government that persons born in the United States of German parents could not be made to perform military duty, but were liable to expulsion as seeking to avoid such duty, see Mr. Bayard, Sec. of State, to Mr. Scherpel, June 23, 1886, 160 *MS. Dom. Let.* 559.

“A series of well-considered cases, extending from the time of the mission of my honored predecessor, Mr. George Bancroft, the negotiator of the above-named treaty, to wit, from 1875 down to and including the period when my immediate predecessor, Mr. John A. Kasson, had charge of this legation in 1885, has interpreted the third clause of the fourth article of the treaty to mean that a naturalized citizen of the United States, having resided there five years, returning to Germany shall have a right of uninterrupted sojourn in the last-named country for the period of two years, provided he obeys the laws thereof. The gentlemen in charge of the imperial foreign office yielded an assent to this interpretation as often as it was asserted by the envoys of the United States. The undersigned would willingly point out the several cases to which he refers, but he is satisfied that these records of the diplomatic correspondence are very familiar to Count Bismarck. He permits himself, however, to mention the cases of Solomon Moritz Stern in 1876, of Ellis Block in 1878, of Edmond Klein in 1879, of Arft A. Rörden in 1880, of Lazard Rosenwald in 1880, of Jurgen I. Grau in 1882-83, and the correspondence connected therewith, among many others of a similar tenor. The argument on which this conclusion was reached need not now be discussed. It was entirely conclusive to the officials of the two Governments, and the result they reached seems to be no longer an open question.

“As a reason for not applying this well-settled interpretation of the treaty to the case of Knudsen, Count Bismarck says in the above-mentioned esteemed note that, on the general grounds developed by

him in former communications, the measure of expulsion must now be executed after a sojourn of more than three months in the house of his parents has been permitted to Knudsen. The undersigned understands these former communications to be the notes of Count Bismarck of December 21, 1885, and of January 6, 1886. The note of December 21, 1885, says (the undersigned quotes only that he may not possibly unintentionally misrepresent:)

“The assumption seems therefore well founded that the persons in question sought discharge from their native allegiance and emigrated to the United States only for the purpose of withdrawing themselves from the performance of military duty in Germany. This same purpose must be assumed in the cases of: (7) Hans Peter Jessen (note of the 9th ultimo, foreign office, No. 116); (8) Heinrich Friedrich Nikolaus Rohlfss (note of the 13th ultimo, foreign office, No. 124), and (9) Constantine Heinrich Edward Rohlfss, (note of the 13th ultimo, foreign office, 123).

“These three persons emigrated to the United States, after attaining the military age, without permission, and without having responded to the duty of presenting themselves for military service. . . . Should a further sojourn, and one for an indefinite period, such as they desire, be permitted them, a furtherance would thereby be afforded to the purpose of those persons, manifestly aiming at evasion of the performance of military duty, which does not appear to be in accord with the interests of the state and the public order.’

“And the note of January 6, 1886, after quoting the substance of the former note, adds:

“If such persons were permitted, after they have acquired American citizenship, and while appealing to this change of nationality, to sojourn again according to their pleasure, unhindered, for a shorter or longer period, in their native land, furtherance would thereby be given to similar endeavors, and respect for those laws would be endangered upon which is based the general liability to military service, one of the most essential and important foundations of our state life.’

“It is not asserted that Knudsen has violated any law or committed any breach of the peace or order of the community, or that he has by word or deed, by persuasion or example, sought to mislead or to excite discontent among the people with whom he associated. This would seem, therefore, to be a case in which would apply with special force the instruction given by the royal Prussian minister of the interior to the authorities of the Royal Government, ‘to abstain from recommending trial and punishment, and in general from every kind of prosecution.’ . . .

“The intention with which he emigrated, the mental process by which he was brought to a decision, in no wise impaired the lawful-

ness of the emigration. So, also, the return to his native country of the emigrant as a naturalized citizen of the other country, after a five years' sojourn therein, is expressly permitted and provided for by the treaty. The emigration is permitted, the return is permitted, the sojourn is permitted. How, then, can the recognition of these three permitted events be a furtherance of a reprehensible desire to evade military service? The very act of emigrating involves the avoidance of military duty. There can be no emigration before the extreme limit of age at which the subject may be called on, which does not involve such avoidance. . . .

"The performance by the emigrant of acts which are separately permitted and sanctioned by the German Government, to wit, emigration, return, and sojourn, can not, when they are combined, give him a quality which, in the absence of any offensive conduct, is dangerous to the state, and thus justify an exception to the rule of two years' residence. No German-born naturalized citizen of the United States can sojourn for any length of time in Germany if the facts of emigration and return are to be considered as proof that the emigration was merely from a desire to avoid the performance of military duty, and such desire renders the person dangerous to the state, and therefore justifies expulsion. If all a man's acts are lawful, his motives, his desires can not be the subject of animadversion; they become important only when the acts themselves are unlawful. . . .

"The undersigned is quite aware that Count Bismarck, in his note of January 6, 1886, says that these expulsions are not by way of punishment, but lest a 'furtherance would thereby be given to similar endeavors, and respect for those laws would be endangered upon which is based the general liability to military service, one of the most essential and important foundations of our state life.' . . .

"It is very true that Count Bismarck says repeatedly, and with great consideration, that this right of expulsion will be exercised with moderation, and only on occasions of imperative necessity. For this assurance the undersigned is duly appreciative, but he can not avoid saying that this is a question of right under treaty stipulations, and not of grace and favor, however kindly and constantly exercised."

Mr. Pendleton, min. to Germany, to Count Bismarck, April 10, 1886, For. Rel. 1887, 376.

With this note, Mr. Pendleton enclosed to Count Bismarck a copy of Mr. Bayard's instruction of March 12, 1886.

"The envoy of the United States of America at Berlin has addressed the foreign office in behalf of several former Prussian subjects, who, when they had attained the age when they were required to perform military duty, or shortly before attaining that age, emigrated to

the United States, and after having become naturalized there, returned to their native country, and were expelled from Prussia by the competent authorities before the expiration of two years from the date of their return. It has, in the majority of cases, been impossible to grant Mr. Pendleton's applications for the revocation of these orders of expulsion. The aforesaid envoy addressed two notes, dated, respectively, April 10 and 16, 1886, to the foreign office, in which he requested that the last two cases that have arisen (those of Knudsen and Burmeister) might be reconsidered. He stated, moreover, that he had been instructed to protest against the action of the Prussian authorities in these cases, inasmuch as his Government regarded it as a violation of the rights guaranteed by treaty to American citizens in Germany.

"The contents of those two notes and of the instructions of the State Department, a copy of which was sent by Mr. Pendleton as an inclosure to his note of April 10, 1886, have been carefully examined, and the undersigned, Imperial German envoy extraordinary and minister plenipotentiary, has been instructed to communicate, in reply to these communications, the following observations to the Hon. Thomas F. Bayard, Secretary of State of the United States.

"The Government of His Majesty the Emperor observes that the United States Government does not dispute the right, which is recognized in international law, of every state to expel from its territory foreigners whose stay in the country is, in the opinion of the Government, prejudicial to public welfare and order.

"The Imperial Government is unable to reach the conviction that the treaty of friendship and navigation concluded in 1828 between Prussia and the United States, or the treaties relative to naturalization concluded in 1868, involve any restriction of this right as regards the parties to said treaties.

"As to the first-named treaty, the Imperial Government thinks it can but refer to its previous declarations. With regard to the naturalization treaty concluded between the North German Union and the United States in the year 1868, the only stipulation contained in it that is now to be considered is that embraced in article 4, paragraph 3. According to this a *renunciation* of the intent to return to the United States (and likewise a renunciation of naturalization as an American citizen) may be considered to exist when the naturalized person remains more than two years in the territory of the other party. So long as there has been no such renunciation, German-Americans who have returned to the country of their former nationality under the presumptions of the treaty are to be considered, according to article 1, as citizens of the United States, and to be treated as such. This, however, is equivalent, for the period of two years only, to a renunciation of the right to treat them as native citizens, and to compel

them as native citizens to perform their civil duties, especially the general duty of service. They are consequently liable to expulsion, as are all other foreigners sojourning in Germany.

"It is, in the opinion of the Imperial Government, too broad an assumption, if the United States Government desires to infer from the said stipulation that Germany has renounced in general its right to expel foreigners who, like these Americans, have been in Germany less than two years. Even if it be supposed that everything is legal, the mere stay of a foreigner in the territory may, under certain circumstances, become detrimental to the public interest. In such cases the Imperial Government must reserve to the authorities of the States of the federation the right to expel at any time even an American who is protected by the treaty, and that, too, before the expiration of the aforesaid term of two years.

"Mr. Pendleton's statement, in his note of April 10, 1886, that both parties have hitherto been agreed concerning an interpretation of the treaty that recognizes the right of undisturbed sojourn for two years, is based upon a misapprehension. The Imperial Government has, on the contrary, always maintained the opposite view, as above stated, and has expressly maintained this position on several occasions; for instance, in the note of July 18, 1878, of the foreign office to the American legation at Berlin relative to the case of Bäumer.

"Mr. Pendleton's reference in support of that statement to the executive orders issued in July, 1868, by the Prussian minister of the interior and the minister of justice also appears to lack sufficient ground. According to those orders it is true there is to be no prosecution of persons showing that they have become naturalized in America, on account of the punishable act committed by them in emigrating. The reference to article 2 of the treaty shows, however, and the context leaves no doubt on this point, that a judicial prosecution only is not admissible. Expulsion, however, resorted to in pursuance of a decision of the police authorities of the state, does not come within the purview of such prosecution, for expulsion is not a punishment in a judicial sense, but an administrative measure adopted by the state out of regard to its own safety and domestic policy.

"It is true that the Imperial Government formerly contented itself with merely reserving in principle to the German authorities the right to expel naturalized Americans before the expiration of the period of two years, while this right was not actually exercised. This was done as long as circumstances permitted, in order to avoid differences of opinion with a friendly government. As, however, a disposition has become more and more manifest, especially among the population of certain portions of the country, to evade the performance of military duty by emigrating to the United States, and by appealing to the treaties of the year 1868, and to enjoy, in spite



thereof, by returning home, the rights and privileges of native citizens, a stricter course has recently been deemed necessary, and this has led to the expulsions in question.

“The perfect right of the Imperial Government to adopt these measures can, after the foregoing statements, hardly appear doubtful.

“The positive necessity and appropriateness of such a course can, on the other hand, naturally be appreciated only from the standpoint of the internal policy of the Empire. In this connection, it is only possible once more to refer to the fact that the Imperial Government deems it irreconcilable with the defense of the interests intrusted to its care for persons who have evaded the performance of military duty by emigration to exercise, on returning after a short absence, all the rights of native citizens, after having eluded the fulfillment of the duties incumbent upon such citizens.

“Although this course is not in actual violation of any law of the state, still the Imperial Government has good reasons to desire that the example set by these persons of a systematic evasion of the performance of military duty should not be followed. It has, consequently, not felt called upon to disapprove the measures of the Prussian authorities now under discussion, or to take any steps designed to bring about a revocation of the orders issued for the expulsion of Knudsen and Burmeister.

“The political interest of the Empire in repressing abuses of the treaty, resorted to with the view of evading military duty, is so vital that, after past experience, the denunciation of the treaties of 1868 would become necessary to German interests, if the interpretation of the treaties, as set forth in Mr. Pendleton's note, should be accepted as final. The Imperial Government has, thus far, not abandoned the hope of being able, by a judicious exercise of the right of expulsion, to avert the evil consequences which, from the German standpoint, are naturally connected with the continued existence of the treaties.

“The Department of State takes the view that, if the principles recently asserted are to be enforced, any German who has emigrated to the United States will, in case of his speedy return, have cause to fear immediate expulsion, and thinks that this state of affairs would be equivalent to a *de facto* restoration of the condition of things which existed before the treaties were concluded. Neither of these assumptions, however, seems well founded. In the case of persons who have emigrated to the United States in good faith, that is to say, who can show that they have done so from motives not connected with the general military service, there will be no occasion for expulsion. Yet even persons liable to military duty, who have emigrated notoriously for the purpose of evading the performance of military duty, are better off now than they were before the conclusion of the

treaties, or than they would be after their denunciation, since now, provided that they do not expressly or tacitly renounce their American naturalization, they suffer expulsion only and can not be punished or compelled to serve in the standing army or the navy."

Mr. von Alvensleben, German min., to Mr. Bayard, Sec. of State, July 8, 1886, *For. Rel.* 1887, 416.

For comments of Mr. Pendleton, minister to Germany, see *For. Rel.* 1887, 379-382.

April 7, 1887, *For. Rel.* 1887, 386, Mr. Pendleton inclosed to Mr. Bayard a translation of an article from the *Berliner Tageblatt*, of April 7, 1887, reading as follows:

"In the meantime a decision of the superior court of administration has been communicated to the Prussian administrative authorities which settles the following:

"(1) The provisions of the treaty concluded with the United States of America in relation to citizenship have undergone no change by reason of section 21 of the Imperial law of June 1, 1870, concerning the acquisition and loss of German citizenship in the Empire and State, but have rather received a clear interpretation, that the acquisition of citizenship in the United States, in conjunction with five years' uninterrupted residence there, works a loss of citizenship in Germany, and that hence such persons are subject to expulsion from the country until their reacquisition of German citizenship, and that this expulsion can not be called in question by remonstrance to the administrative authorities.

"(2) The right of reacquiring citizenship in Germany, according to section 21, subdivision 5, of the Imperial law of June 1, 1870, does not extend to persons for whom the acquisition of a foreign citizenship has worked the loss of German citizenship in the Empire and State."

Subdivision 5 of section 21 of the Imperial law of June 1, 1870, is as follows:

German subjects "who have lost their citizenship by ten years' residence in a foreign country and subsequently return to the territory of the North German Confederation, acquire citizenship in that State of the confederation in which they take up their residence by a decree of admission of the superior administrative authorities which must be issued to them at their application." (*Id.* 387.)

With reference to the article from the *Berliner Tageblatt*, Mr. Pendleton said:

"There seems to be nothing particularly new in this résumé of the decision, except possibly in the notice that remonstrance against proceedings of expulsion will not be heard by the administrative authorities, and that the provisions of the fifth paragraph of Article 21, of the law of June 1, 1870, does not apply to persons who have lost their German citizenship by reason of naturalization in a foreign country."

"The undersigned, Secretary of State of the United States, had the honor to receive some time ago the note of Mr. von Alvensleben, envoy extraordinary and minister plenipotentiary of His Majesty the Emperor of Germany, of the 8th July last, relative to the cases of several naturalized citizens of the United States of German origin

who were expelled from Prussia not long after their return on a visit to that country. The note in question, however, while referring to certain cases specifically, contains a general discussion of the rights of sojourn of naturalized citizens of the United States of German origin in their native country, in the form of a reply to the views expressed in two notes of Mr. Pendleton, envoy extraordinary and minister plenipotentiary of the United States, to the Imperial foreign office, bearing date, respectively, the 10th and 16th of April last.

"The views of this Department have already been so fully stated in previous communications to the Imperial Government, and especially in the note of Mr. Pendleton and its inclosures of the 10th of April last, that their further statement or amplification would seem unnecessary, if it were not for the apparent misapprehension, betrayed in the note of Mr. von Alvensleben, of the Imperial Government as to the views of this Department on the subject of the right of expulsion. The esteemed note of Mr. von Alvensleben correctly observes that the United States Government does not dispute the right, which is recognized in international law, of every state to expel from its territory foreigners whose stay in the country is prejudicial to public welfare and order; but at the same time it apparently assumes that the exercise of that right is denied by this Government to Germany in respect to naturalized citizens of the United States of German origin during a period of two years immediately ensuing their return to their native country.

"But for this apparent misapprehension of the views of this Department the undersigned would have read with not a little surprise the declaration contained in Mr. von Alvensleben's note, that the denunciation of the treaty of 1868 would become necessary if the interpretation set forth in Mr. Pendleton's notes should be accepted as final.

"It has not been the purpose of this Department to deny to Germany the right at any time to expel foreigners whose presence may be found to be dangerous to the public safety, but while thus freely admitting the right of expulsion this Department holds that its arbitrary exercise can not be regarded as consistent with existing relations.

"It is not understood ever to have been claimed by this Government, and it is not claimed by it now, that the clause in the treaty of 1868 in respect to a two years' residence of naturalized citizens in the country of origin was under all circumstances to be held to be a guaranty of such residence, and that the intention not to return to the country of adoption could not be formed or held to exist at any time before the expiration of that period. It is clearly stated in the fourth article of that treaty that the thing which is to operate as a renunciation of adoptive allegiance is a renewal of residence in the country of origin without an intent to return to the country of adoption. Such

intention not to return, it is provided, may be inferred from a two years' residence. But this is merely a rule of evidence, establishing a *prima facie* presumption, and the intention not to return may be held to exist independently of the consideration whether that presumption has been created in the manner defined by the clause of the treaty in question.

"Any other interpretation of the treaty would lead to the manifestly untenable conclusion, for which the undersigned is unable to find any warrant, that the country of origin can not accept, at any time during the two years immediately succeeding his return thereto, the express declarations and unequivocal acts of a citizen or subject who has been naturalized abroad, as any evidence of his intention with respect to the duration of his stay.

"The position, however, of this Department is that there must be such declarations or such acts, in addition to the mere fact of return to the country of origin, in order to create or justify the conclusion that naturalization has been renounced; and that this question, which arises under a mutual convention and is of equal concern to both parties, is one for mutual consideration and discussion and concurrent decision.

"In respect to the question of expulsion, it is maintained that, although it is not a question arising under the treaty, it is due to comity, as well as to the existence of the treaty, that reasonable grounds for expulsion should exist and be made known. The undersigned is unable to perceive the force of the observations contained in Mr. von Alvensleben's note, that the necessity and appropriateness of the course of the Imperial Government can be appreciated only from the standpoint of the internal policy of the Empire, if, as seems to be the case, it is intended to infer that the course of the Imperial Government in regard to expelling foreigners can not be made a ground for inquiry or complaint by the Government of such foreigners.

"The undersigned is unable to assent to this proposition; especially in view of the fact that, as the note of Mr. Von Alvensleben is understood, it admits that the Imperial Government regards as a sufficient cause for expulsion the fact that exemption from military service has been acquired by emigration and naturalization in the United States. The basis of the treaty of 1868 is understood to have been the mutual acknowledgment by the contracting parties of the right of self-expatriation, upon compliance with the conditions therein agreed upon and defined. Expatriation thus accomplished was to be mutually and equally acknowledged by both contracting parties, who covenanted to treat the naturalized citizens of each other on the same footing as native-born citizens. There was no limitation as to the age at which persons might emigrate from either

country and be naturalized in the other. It is, however, clear that to apply the fact that exemption from military service has resulted from emigration and naturalization abroad as a sufficient ground for expulsion, would be to destroy as to persons of a certain age the right of orderly return to and law-abiding sojourn in the country of origin, which is stipulated in the treaty of 1868 and may, within its plain meaning, be continued for more than two years; and in addition to creating a discrimination not contemplated by the treaty, would subject its construction wholly to the changing views and regulations of one of the contracting parties.

“There is no disposition on the part of this Government to question the right of the Imperial Government to expel any foreigner who violates the laws or the policy of the Empire, or whose misconduct may cause his presence to be productive of disorder.

“In this respect all citizens of the United States, whether native or naturalized, are held to the same accountability and stand on the same footing. But to concede that the fact of being a naturalized citizen of the United States, with the rights and exemptions incident to such citizenship, may, irrespective of offense by word or deed or general course of misconduct, be held of itself as to a certain class of citizens of the United States a sole and sufficient ground for expulsion, would be equivalent to a deprivation of all right of sojourn and peaceable residence in the German Empire except under the most precarious and arbitrary limitations.”

Mr. Bayard, Sec. of State, to Mr. von Alvensleben, German min., March 4, 1887, *For. Rel.* 1887, 419.

“This subject [of expulsion] is not regulated by the treaty in question [with the North German Union, Feb. 22, 1868] and is not necessarily covered by any of its provisions. I say not necessarily, because the recognition of the right of return to and residence in the country of origin, which the treaty contains, implies that a person so returning and residing will not be expelled unless some reason for such a measure exists beyond the mere fact that he has expatriated himself. But this does not take away either from the United States or from Germany in respect of any class of persons, the general right which governments possess and which this Government freely exercises of expelling aliens whose presence is regarded as detrimental to the public interests. The existence of such a right is not questioned, and its exercise is not in itself a ground of complaint.

“It is the method or manner of its exercise that may afford a ground for remonstrance. This is a question to be determined upon the facts of each case. It is undoubtedly the duty of all governments in asserting the rights that belong to them to do so with a just regard for the rights and interests of the persons who are affected, and to

this end to avoid harsh and arbitrary proceedings. But this is a question quite apart from that of the existence of the right."

Mr. Blaine, Sec. of State, to Mr. Schroeder, Jan. 11, 1890, 176 MS. Dom. Let. 96.

February 6, 1897, the royal Prussian ministers of justice, the interior, and war, issued circular regulations touching  
**Correspondence of** the formal treatment of petitions for pardon sent in  
**of 1897-1901.** by persons sentenced for evasion of military service.

They made no change in the principles previously observed "in regard to the action of the police toward the persons in question, in particular to the treatment of former German subjects who have returned to Germany after naturalization in the United States of America."

March 29, 1897, the embassy of the United States at Berlin requested the Imperial secretary of state for foreign affairs to use his good offices to the end that the Royal Prussian Government might bring to the attention of the minor executive officials the circulars of the royal Prussian ministers of justice and the interior of July 5 and July 6, 1868, as well as the decision of the Imperial supreme court at Leipzig of January 20, 1896 (*Entsch. d. R. G. in Strafs.*, Bd. 28, S. 127), "in order that naturalized American citizens of German origin may not be subjected to unnecessary annoyance and molestation by local authorities, on account of their having emigrated without permission or before performing military service in Germany, while sojourning in Germany upon their legitimate business, or while temporarily visiting their parents or relatives at their former homes."

The German Government replied that as the circulars in question had twice previously been brought to the attention of the proper authorities, and as the decision of the Imperial court (*Penal Cases*, vol. 28, p. 127) coincided with the principles laid down in the decrees, and as no violation of those principles was alleged to have occurred in any recent case, there did not seem to be sufficient reason for bringing them again to the attention of the authorities. "If naturalized German-Americans," said the German Government, "were at different times sentenced for the violation of military duty, and these cases were made the subject of discussion, this was caused by the fact that the authorities did not know that those persons were naturalized in America, and the sentence was at all times revoked wherever this fact was established.

"The undersigned permits himself to add that these decrees do not affect the rights of the local authorities to expel, for state police considerations, former German subjects who emigrated to America at or shortly before reaching the military age, and who, after naturaliza-

tion there, returned to their native land, whenever they make themselves obnoxious or their presence seems undesirable for other reasons."

Baron Marschall, Imp. min. for. aff., to Mr. Uhl, Am. amb., March 27, 1897; Mr. Uhl to Baron Marschall, March 29, 1897; Baron Marschall to Mr. Uhl, April 1, 1897: For. Rel. 1897, 209, 210.

"Three different kinds of expulsion may be recognized in the precedents afforded by the recent history of Germany.

"First. Each of the German States still retains the sovereign right of expulsion, so that a foreigner may, in certain cases, be expelled from one State, but continue to reside thereafter unmolested in another State of the Empire, his expulsion from the former only having effect in the territory within which the authorities of that State have jurisdiction.

"Second. In certain other cases where the reasons for expulsion are such as would make the stay of the foreigner in any one of the States of the Empire objectionable, Imperial laws have been passed whereby an expulsion by the authorities of one State becomes effective not only in that State but within the whole Empire, thus effectually banishing the individual from Germany.

"Third. There is another kind of expulsion which, though in form identical with that last preceding, is so different in its real nature as to warrant its treatment as a separate class, namely, the expulsion by the Prussian authorities of persons, either individually or en masse, for certain grave reasons of state, as examples of which may be mentioned the expulsion of Poles from certain German States, of Frenchmen and others from Alsace-Lorraine, and of inhabitants of Schleswig-Holstein. These expulsions have usually been carried out by Prussia or through Prussian initiative, and take the second form above given, but for reasons which concern not only Prussia but the whole of Germany. When it is remembered that Prussia is the leading member of the German Confederation, that the King of Prussia is the German Emperor, that the chief functionaries of the Kingdom are also leading officials of the Empire, and that an expulsion by these Prussian authorities is given effect as an expulsion from the Empire by virtue of Imperial laws passed for reasons of the Imperial welfare, it will be seen that they are in substance indirect expulsions by the Empire, though in form mere State expulsions effective throughout the other States.

"Referring to the first class above given, namely, expulsion by a State from its own proper territory only, I take Prussia as an example, and on referring to a leading authority on Prussian State law I find the statement: 'Measures of expulsion can be exercised against foreigners, partly for certain punishable acts which have been made

the subject of judicial sentence, and partly as purely police measures taken in the interest of safety and order.' (Rönne, 'Das Staats-Recht der Preussischen Monarchie,' 2 Band, 2 Abtheilung, sec. 381, p. 134.)

"This is also doubtless a true statement of this principle as contained in the State law of each of the other States of the German Empire.

"The distinction to be held in mind is whether the expulsion is to be effective as a banishment—

"a. From the whole German Empire, or only

"b. From the territory of the expelling State.

"The power by which the authorities of any particular State are given extended jurisdiction to expel from the Empire is contained in various Imperial laws and decrees. As examples of these may be mentioned—

"1. Certain sections of the Reichs-Strafgesetzbuch.

"2. The Imperial law regarding the expulsion of the Jesuits.

"3. The Imperial law regarding the Social Democrats, etc.

"To sum it up, it may be said that, first, as regards the power of expulsion the respective States exercise this right by virtue of their inherent sovereign power and the usages sanctioned by international law; second, that the procedure whereby it is given effect is for the most part contained in 'Administrative Bestimmungen' and 'Ministerielle Erlasse,' which, not being in the form of public statutes and often embodied in secret orders of the State and Imperial authorities, are not available for examination.

"Concerning the right of expulsion as well as the manner, the procedure above indicated has been modified in certain cases by special treaties, as, for instance, the convention between the German Empire and Russia of February 10, 1894, for the exchange of undesirable persons, subjects of either of the two countries, to the other, respectively; also a convention with Switzerland bearing date April 27, 1876."

Mr. White, ambass. to Germany, to Mr. Hay, Sec. of State, April 21, 1900,  
For. Rel. 1900, 25, 27-28.

"It seems well to add something regarding . . . a large class of cases . . . in which foreign governments . . . may suspect a *prostitution of American citizenship*. . . . American representatives abroad have constantly to be on their guard against this evil, so injurious not only to proper relations between our own Government and others, but to the good name of our country. . . . My sympathies have always been and are now strongly with all bona fide claims made by American citizens of foreign birth for protection in



the country of their origin. . . . I recall no case in which the embassy has been unable to secure the friendly attention of the German Government to cases evidently bona fide. . . . The cases of young men of military age who, having secured naturalization, return immediately afterwards to visit their family and others present peculiar difficulties, and these difficulties are frequently increased by their indiscretion and even by conduct to which a much worse name might be applied. It is, of course, galling to the military authorities of a nation, in which the military service of all its sons is considered the fundamental condition of national existence, to have young men who have disappeared just at the military age reappear among their old comrades, who are going through their military service, and display proofs of American citizenship which appear to the authorities to be in the nature of a fraud. Still, even in these cases, difficult as they are, whenever there is evident bona fides, and also a reasonably discreet conduct on the part of the person returning, he has, as a rule, been allowed to remain long enough to visit his relatives. . . . I would much prefer to have them allowed to remain for the time named in the Bancroft treaties, but I state the case as it undoubtedly appears to the German authorities, and I feel bound to say that but for this exercise of what they consider not only a right inherent in German territorial sovereignty, but as an absolutely necessary safeguard to good order and even to the national existence, I do not believe the Bancroft treaties would be allowed to stand. . . . In view of all these considerations, while aiding the applications of all our American citizens of German birth who show good faith, I have done what I could to resist all efforts to prostitute American citizenship. . . . Hardly a day passes that there do not come to this embassy persons who have made the briefest possible stay in the United States and demand passports clearly for the purpose of passing their lives here free from all obligations either to the country of their birth or of their adoption. Many of these have not the slightest appreciation of their real rights or duties as Americans, have no feelings in common with those of American citizens, and some are not even able to write or speak the English language. . . . The more respectable of these seek merely to promote their own interest or pleasure, not hesitating apparently to take any oath which may be necessary to secure the renewal of a passport; others, for purposes even less respectable, and some even for criminal purposes, as our records in more than one case will show. Under these circumstances, while advocating all effective measures for the protection of bona fide American citizens of foreign birth when they return to Europe, I am slow to advocate anything like drastic measures likely to arouse ill feeling between our own Government and any other and

sure to render the securing of the rights of bona fide American citizens of foreign birth when abroad more difficult."

Mr. White, American amb. to Germany, to Mr. Hay, Sec. of State, April 21, 1900, For. Rel. 1900, 25-26.

Mr. White also adverted to the fact that foreign-born persons naturalized in Great Britain revisit their native land at their own risk, the British Government declining there to protect them. In this relation he cited Cockburn on Nationality, page 107.

"During the period covered, 243 persons have actually been expelled from the German Empire. Of this number, 218 were males and 25 were females. Twenty-three persons were expelled on the strength of paragraph No. 39, of the imperial penal code, after undergoing imprisonment for theft, etc., and 220 on the strength of paragraph No. 362, for vagrancy, begging, professional prostitution, and other so-called offenses.

"Of these persons, 155 were of Austrian (including Hungarian, Bohemian, etc.) nationality, 19 were Russian, 19 were French, 17 were Dutch, 13 Swiss, 5 Belgian, 4 Italian, 4 from Luxemburg, 4 Swedish, 2 Danish, and 1 Norwegian.

"Of these persons, 90 were expelled by Prussian authorities, 63 by Bavarian authorities, 43 by Saxon, 24 by imperial (Alsace-Lorraine), 9 by Baden, 7 by Hamburg, 3 by Weimar, and 1 each by the authorities of Württemberg, Mecklenburg, Hesse, and Reuss."

Compiled by Mr. Jackson, sec. of U. S. embassy at Berlin, from Nos. 1-20, inclusive, of the *Central-Blatt für das Deutsche Reich*, the official weekly publication of the Imperial German home office, dated from January 8 to May 21, 1897. (For. Rel. 1897, 229.)

M. F. Schaaf was born in Leipzig in 1872 and emigrated with his parents in 1882 to America, where he became a citizen through the naturalization of his father in 1889. In September, 1899, after his father's death, he returned to Leipzig, and after remaining there about a year went to Altona, near Hamburg. Shortly after his arrival in Altona he was expelled from Prussia on account, it was said, of his father having neglected to obtain his release from German allegiance before his emigration. He then removed to Hamburg, but soon received an order to leave that city within 14 days. In view of the interest taken in the case by the American embassy, he was allowed to prolong somewhat his stay in Hamburg, but the authorities felt obliged to maintain the order of expulsion, as it was assumed that he had emigrated in order to evade military service.

The Government of the United States, said Mr. Hay, considered the German contention extreme and even scarcely reasonable, as Schaaf had emigrated with his parents when only 10 years old.

The United States, it was said, would regret if such cases indicated a purpose "to hold all American citizens of German origin, who emigrated during minority, amenable to the imputation of intention to evade military service, no matter what their age may have been at the time of emigration." Such an assumption would, it was maintained, be incompatible with the spirit and intent of the treaties of naturalization, since it would almost amount to the injection into them of a "requirement of prior consent to change of allegiance, a requirement not admitted by the negotiators of those conventions."

Mr. White, the American ambassador, in reply explained the Prussian position as follows:

"The position taken by the royal Prussian authorities is that it is to be presumed that any one who emigrates from Prussia without having performed military service emigrated for the purpose of evading such service, the age of the person in question at the time of his emigration not being taken into account. The Prussian authorities hold that no such person should be allowed to settle in Prussia or to make a prolonged visit in that country while still of an age when, had he remained a Prussian subject, he might be called upon for military service. They consider that the provisions of the Bancroft treaties are sufficiently complied with if the person in question is allowed to visit his former home and to remain there a few weeks; and of late years, in certain parts of the country, expulsion orders have become more or less frequent. The question of having obtained permission to change allegiance does not appear to influence the case, the idea being merely that a person should not be able, through a few years' residence abroad and naturalization in a foreign country, to return to his native place and to there sojourn, free from the duties and obligations of other men of the same age who have lived there continuously. It sometimes happens, of course, that local officials show too much zeal and that there is real hardship connected with a case of expulsion, but it must not be forgotten that the number of persons expelled or otherwise molested on account of their not having performed military service is relatively very small when considered in connection with the great number of American citizens of German origin who visit their former homes every year.

"In Germany a record is kept of every male child born in the country. At the beginning of each calendar year official notice is published to the effect that all males born during the twentieth preceding calendar year are to report for examination as to their fitness for military service. At the end of the year proceedings are taken against all those who have failed to report, and they are all sentenced to pay a fine or undergo imprisonment, and warrants are

issued for their arrest. When such a person returns from the United States or any other country, unless the fact of his change of nationality is recorded and his name has been taken from the lists, he is liable at any time to be called upon to pay the fine, the same being almost invariably refunded, in the case of an American citizen, upon intervention being made by the embassy. In Zahl's case he was probably sentenced several years before he became a citizen of the United States.

"In this connection I beg to call attention to Mr. Kasson's dispatch No. 124, of January 6, 1885, and to the inclosures therein. (For. Rel. 1885, p. 392.)"

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, Feb. 5, 1901, 158; Mr. White, amb. to Germany, to Mr. Hay, Sec. of State, Feb. 16, 1901: For. Rel. 1901, 158, 159.

In the case of Albert Ehrenstroem, a naturalized citizen of the United States of German birth, who was ordered to leave Prussian territory before February 1, 1901, the police authorities at Magdeburg, replying to the inquiry of an American consul, stated that the order of expulsion was "based upon an instruction from a higher source, under which Germans formerly liable for military service who return to Germany after having acquired American citizenship are to be permitted to remain only for a short time, which is to be measured by the circumstances and purposes of their sojourn."

On March 20, 1901, the following general order was published: "*Military*.—By higher authority the attention of police and municipal officials has been called to the following: Persons who, before fulfilling their military obligations, or for the purpose of evading the same, have emigrated to the United States of America, and there acquired American citizenship, will be permitted to remain in Germany only for a period of weeks or months, according to the circumstances of each case, but they will not be permitted to settle permanently in Germany."

With reference to this order, the embassy at Berlin was requested to report whether former Germans who had become naturalized in other countries than the United States were, on their return to Prussia, expelled therefrom after a limited stay of a few weeks or months, or whether they were permitted to reside there indefinitely and to carry on business for themselves or as agents of foreign commercial houses. The embassy replied that there was apparently no intention on the part of the Prussian Government to discriminate against American citizens, but that, in respect of the question under consideration, it was difficult to draw a parallel (1) because Germany had no treaty with any other country similar to those of 1868 with the United States, and (2) because, owing to the fact that obligatory

military service existed in most all continental countries, few young Germans emigrated to them. Between many of those countries, indeed, there existed informal correspondence, or even formal agreements, under which persons attempting to evade military service were handed over to their home authorities. Where no treaty existed, the returned German was not considered as entitled to be protected by the authorities of the country in which he had become naturalized, and was generally punished in accordance with German law, this being the case even with British subjects, whose Government generally declined to intervene in behalf of a naturalized subject who returned to the land of his birth. The general rule of the German authorities appeared to be to make it unpleasant for all persons of German birth who had evaded military service in their native country, whether their emigration took place for the purpose of evading such service or not, it being held by the authorities, especially in Prussia, that the sojourn of such persons for any length of time caused discontent and dissatisfaction among persons of the same age who had remained at home. As to the supposed reason for the general order, the Prussian ministry of the interior had stated that attention had merely been called to what had been the practice for a long time, in order that persons who contemplated a renewal of their residence in Germany might not be subjected to hardship.

Mr. Hay, Sec. of State, to Mr. Jackson, chargé at Berlin, April 16, 1901, For. Rel. 1901, 175; Mr. White, amb. to Germany, to Mr. Hay, Sec. of State, May 4, 1901, enclosing a report of Mr. Jackson, sec. of embassy, of May 4, 1901, For. Rel. 1901, 177.

(5) OPERATION OF TREATIES.

§ 394.

The operation of the naturalization treaties with the North German Union and other German States of 1868 is discussed in a report of Mr. H. G. Squiers, second secretary of embassy at Berlin, April 17, 1897.<sup>a</sup>

Between April 23, 1868, and April 7, 1897, nearly twenty-nine years, there were presented to the German Government 447 cases, of which 48 arose in Alsace-Lorraine, and 88 in Schleswig-Holstein.

Of the 447 cases, 316 concerned persons who emigrated between the ages of 16 and 22. By the German law persons who have passed their 17th year are placed on the military list.

Length of residence in the United States before and after naturalization was also a significant circumstance. In 72 cases there was no

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<sup>a</sup> For. Rel. 1897, 211-226.

record of this. In the remaining 375 cases, in which the record existed, 205 were those of persons who returned within six years after naturalization, while 212 out of 381 returned to their native land within two years after naturalization.

Of the 447 cases, 325 were decided favorably. More than half of those decided unfavorably were cases of expulsion, especially from Schleswig-Holstein.

In cases of arrest or of compulsory service, the certificate of naturalization was usually taken up by the authorities and, when the case was finally decided, was returned to the owner.

In 104 cases, in which the intervention was unsuccessful, the reasons for the failure were as follows: Less than five years' uninterrupted residence in the United States before naturalization, 4; desertion from the German army or navy, 15; fine collected before naturalization, 4; conduct such as to have a bad influence on the community, 7; nonextension of treaty of 1868 to Alsace-Lorraine, 7; deception as to facts, 1; acquisition of German nationality, 5; emigration to avoid military service, 53; retention of German allegiance, 7; residence in Germany for more than two years, 2; emigration without permission, 1.

The following is a summary of the grounds for and the result of intervention:

Grounds.	Number of cases.				Alsace-Lorraine.			Schleswig-Holstein.		
		Successful.	Refused.	Pending.	Successful.	Refused.	Pending.	Successful.	Refused.	Pending.
Compulsory service .....	52	40	12	.....	2	1	.....	3	.....	.....
Arrest .....	13	10	3	.....	.....	.....	.....	.....	.....	.....
Compulsory service and fine .....	4	3	1	.....	.....	.....	.....	.....	.....	.....
Fine and arrest .....	13	12	1	.....	2	.....	.....	.....	.....	.....
Name on military list .....	4	2	2	.....	.....	.....	.....	.....	.....	.....
Fine .....	229	192	26	7	21	9	1	10	2	.....
Expulsion .....	126	63	59	6	6	4	.....	23	47	2
Fine or expulsion .....	1	1	.....	.....	.....	.....	.....	.....	.....	.....
Fine and expulsion .....	4	2	2	.....	.....	.....	.....	.....	.....	1
Compulsory service or expulsion .....	1	1	.....	.....	.....	.....	.....	.....	.....	.....
Total .....	447	326	106	13	31	14	1	36	49	3

## 2. BELGIUM.

### § 395.

A naturalization treaty with Belgium was concluded November 16, 1868. It provides, broadly, that citizens of the one country "who may or who shall have been naturalized" in the other shall be considered as citizens of the latter; but a five years' residence is requisite to release from military obligations.

## 3. SWEDEN AND NORWAY.

## § 396.

A naturalization convention between the United States and Sweden and Norway was concluded May 26, 1869. Under this convention a citizen of the one country who has resided in the other "for a continuous period of at least five years" and been naturalized is recognized as a citizen of the latter; but, by an accompanying protocol, it is stipulated that the five years' residence shall not be a prerequisite where the individual has been discharged from his original citizenship.

## 4. GREAT BRITAIN.

## § 397.

By the convention between the United States and Great Britain, signed May 30, 1870, naturalization, whenever acquired in the one country, is recognized in the other.

As to the negotiation of this convention, see Moore, *Int. Arbitrations*, I. 495, 501, 502, 503, 516; *Dip. Cor.* 1868, I. 159, 183, 331, 358; Moore, *American Diplomacy*, 184-189.

As to the reservation made, in behalf of persons already naturalized, of a right of renunciation within two years after the exchange of ratifications, see Mr. Fish, *Sec. of State*, to Mr. Packenham, Sept. 4, 1871, 15 MS. Notes to Gr. Br. 340.

## 5. AUSTRIA-HUNGARY.

## (1) CONDITIONS OF CHANGE OF ALLEGIANCE.

## § 398.

François A. Heinrich was born in New York in 1850 of Austrian parents, temporarily residing in that city, who, when he was two or three years old, returned with him to Austria. It was stated that he at one time had a passport as a citizen of the United States, but also that in 1866 and 1867 he travelled under an Austrian passport. It appeared, upon the authority of the Austrian minister at Washington, that by the laws of that country a foreign-born child of Austrian parents took the nationality of the latter. The Austrian Government having called upon Heinrich to render military service, the Attorney-General of the United States, to whom the case was submitted, advised that, as the naturalization convention between the United States and Austria-Hungary of September 20, 1870, recognized the right of a citizen or subject of the one country to become a citizen or subject of the other, and as Heinrich had travelled under an Austrian passport, these facts indicated a manifestation of consent on his part

to be treated as an Austrian; that such consent, cooperating with the law of Austria with reference to the foreign-born children of Austrian subjects, and accompanied with continued residence in that country, "effected a complete change in his nationality from American citizenship to Austrian citizenship;" and that, having once acquired the latter, he could not at pleasure cast aside his Austrian nationality or the obligations pertaining thereto so long as he continued to reside in Austrian jurisdiction. The Attorney-General therefore expressed the conclusion that, under the provisions of the convention, Heinrich should be held by the United States to be an Austrian subject and treated as such; that he was "not an American citizen, and, consequently, not entitled to protection" from the United States.

Williams, At.-Gen., Dec. 21, 1872, 14 Op. 154.

This opinion was communicated in substance by Mr. Fish, Sec. of State, to Baron Lederer, Aust. min., Dec. 24, 1872, For. Rel. 1873, I. 78.

Under Art. I. of the convention of 1870, it is necessary that the person shall have resided within the United States at least five years, and during that time have been naturalized; and the requirement of five years' residence applies in all cases, even though the naturalization in the United States is asserted under the special legal provisions that allow admission to citizenship after less than five years' residence.

Mr. Rockhill, Act. Sec. of State, to Prince Raoul Wrede, Aug. 7, 1896, MS. Notes to Aust. Leg. IX. 273. See, also, For. Rel. 1896, 13-15, citing Williams, At.-Gen., 1872, 14 Op. 154.

The Austro-Hungarian legation at Washington, June 8, 1896, called attention to the necessity of using, where Austrians or Hungarians were naturalized in the United States, a form of oath which should "mention the fact of the existence of separate Austrian and Hungarian citizenship," and which should "also, in referring to the sovereign, allegiance to whom is renounced by the person relinquishing his Austrian or Hungarian citizenship, make express mention of the joint character of the ruler, who unites the two constituent parts of the monarchy under his scepter." The oath should therefore state that the person renounced his "Austrian" or "Hungarian" citizenship. To the statement that the applicant was an Austrian or a Hungarian there might be added the words "and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to his Majesty the Emperor of Austria and Apostolic King of Hungary."

The Department of State sent a memorandum on the subject to the governors of the several States and to the Attorney-General of the United States, for the information of the Federal and State



courts of the Union which were authorized to issue certificates of naturalization.

Prince Wrede, chargé, to Mr. Olney, Sec. of State, June 8, 1896, For. Rel. 1897, 23; Mr. Olney, Sec. of State, to Prince Wrede, chargé, July 7, 1896, For. Rel. 1897, 24.

Ivan Dominik Benich (or John Benich) was born at Dvorska, Hungary, Aug. 3, 1871. In March, 1884, he received from his home authorities a passport and emigrated to the United States, where, on October 5, 1892, he was naturalized. May 16, 1893, being then on a visit to his native place, he was arrested and held for military service. He bore at the time his certificate of naturalization, and also a passport issued April 15, 1893, by the United States legation at Vienna. He was released on the intercession of the legation. Meanwhile the question whether to strike his name from the military rolls remained pending before the judicial authorities, and on May 26, 1894, the ban of Croatia decided that as Benich had not resided uninterruptedly for five years in the United States, and therefore had not acquired American citizenship in accordance with the convention of Sept. 20, 1870, he was to be considered as having gained it fraudulently; that he consequently remained, under par. 50, Art. I., of the Hungarian law of 1873, touching the acquisition and loss of citizenship, a subject of Hungary; and that the United States should be asked to cancel his certificate of naturalization and passport.

The allegation that Benich had not resided five years uninterruptedly in the United States was based on the fact that in November, 1888, he returned to his native place, remaining there till the end of April, 1889, and meanwhile acting as a witness at baptisms and weddings, arranging balls, and on one occasion obtaining a passport for use in Bosnia and Herzegovina; and that he returned again in April, 1893, being soon afterwards arrested. It was therefore said that, as his first absence from his native country lasted only three years and several months, and his second only four years, he could not have resided in the United States uninterruptedly for five years.

In reporting upon the case, the minister of the United States at Vienna said:

"They [the Hungarian authorities] seem to conclude, and in such conclusion the foreign office seems to concur, that the five years' residence provided for in the treaty means actual uninterrupted bodily presence of the applicant for the period prescribed. Such an interpretation would make the accidental or ignorant crossing of the boundary line of the nation, even for the moment, a suspension of his inchoate right and require a new inception of the probation period. I can not subscribe to such a narrow and unnatural construction of the language of the treaty. I take the terms 'have resided' and

'residence' to mean something more than mere personal presence; they are intended to have the larger and more natural definition which carries with it the idea of a fixed and permanent abode, an abiding place selected with the *animus manendi* on the part of its owner or possessor. The agent of our Government, in drafting or consenting to the phraseology used in the treaty, which is attested by his name, must presumably have had in mind the existing laws of his own Government in reference to the subject-matter of the treaty itself. This is indicated by the period of time required as to residence being the same as that in case of ordinary naturalized citizens of the United States, and the entire phraseology of the section is not unlike that used in the amended statute of 1870, enacted about two months prior to the conclusion of this treaty. That act required that 'no alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.' (U. S. R. S., § 2170.) The language of the treaty is: 'Citizens of the Austro-Hungarian monarchy who have resided in the United States of America uninterruptedly at least five years' and have become naturalized, etc., shall be treated as citizens, etc. Both use the term 'resided.' The one requires that he reside for a continuous term and the other that he shall have resided uninterruptedly. If there be a difference in meaning, it must be admitted that the statute is more rigorous in its requirements as to residence than the treaty. It could more plausibly be argued that the continued term of five years was broken by personal absence than that his residence was interrupted thereby. It will be remembered, however, that Congress gave a legislative construction to this legislation by striking out from the original act of 1813 the words 'without being during the said five years out of the territory of the United States,' the courts having held under the old statute, as they were obliged to do, that personal absence, though temporary, interrupted the running of the statute. After the amendment so made in 1848, however, the courts have been unanimous, so far as I am informed, in holding mere personal presence not indispensable, and that mere temporary absences, unaccompanied by changes of abode, habitation, or intention, do not interrupt the probation of the alien.

"It will be observed that if this be the proper construction to be given the treaty, the voluminous testimony taken by the authorities of Croatia, at an expenditure of so much time and the exhibition of so great diligence, has but little bearing on the case itself, for if it be established that young Benich returned to Croatia for a temporary visit to his parents, with the fixed and continuing intention of returning to his home in Chicago, the acts proven by the numerous witnesses would not be in conflict therewith. He might, without abandoning his residence, witness baptisms, attend marriages, arrange

balls, and even receive passports from Austria-Hungary, if he found it necessary to visit Bosnia and Herzegovina. He was not yet a citizen of the United States; he was still a citizen of Austria-Hungary, and the latter alone could grant him such a right. With due respect, it seems to me that no fact enumerated in the findings of the court, except the unexplained absence of Benich for so long a period of time, tends to show an interruption."

The Department of State replied:

"The Department fully concurs in your view that a reasonable and proper construction of the language of the treaty—resided uninterruptedly—does not preclude a mere temporary absence of the alien during the period of probation, when such absence is unaccompanied by any intention of changing his domicile."

Mr. Tripp, min. to Aust.-Hung., to Mr. Gresham, Sec. of State, Aug. 23, 1894; Mr. Uhl, Act. Sec. of State, to Mr. Tripp, Sept. 14, 1894, For. Rel. 1894, 36, 38, 46.

Anton Guerra was born in Hrastnig, Styria, Nov. 26, 1875. He emigrated to America in August, 1889. He was naturalized in Pennsylvania, May 3, 1897, and, obtaining a passport, returned to his native town. After his arrival there, he was arrested, Aug. 5, 1897, for nonperformance of military service, but through the aid of a local attorney was released. In the following spring, when the recruits were summoned for service, being still in Hrastnig, he was again notified, March 6, 1898, to present himself for military duty. He then appealed to the United States consul-general at Vienna, who referred his letter to the legation; and, upon the presentation of the case by the latter, he was set at liberty and his name stricken from the military lists.

Mr. Tower, min. to Austria-Hungary, to Mr. Day, Sec. of State, June 4, 1898, For. Rel. 1898, 16.

Mr. Tower, in his dispatch to Mr. Day, said: "Upon inquiry into the facts, I discovered that Mr. Guerra belongs to that class of foreigners who go to the United States and remain there long enough to obtain the privileges of citizenship, after which, upon various pretexts, they return to their native country with an American passport. Most of them have never performed the slightest service to our Government in return; and that is the case with Anton Guerra, who has never paid any taxes, owned any property, established any tangible interest, or served upon a jury within the United States of America.

"Nevertheless, it was evident that he had emigrated to America before he was liable to military duty in Austria-Hungary, and therefore, under the provisions of the treaty of 1870, his United States passport should have been sufficient protection to him from arrest. His passport had been presented to the authorities in Styria and disregarded by them. It was this disregard of his passport which led me to present his case at once to the Austro-Hungarian ministry of foreign affairs."

Julius Graber, a native of Hungary, who had been naturalized in the United States, was, on his return to Hungary, arrested for non-performance of military duty. His arrest was due to the fact that he had failed to declare his American citizenship; and, when the fact of his American nationality was ascertained, his name was erased from the military rolls.

For. Rel. 1890, 25.

A similar case is that of Erminio Demartini, For. Rel. 1899, 25-31.

See, for other cases of arrest, followed by discharge, For. Rel. 1899, 60-67, 68-75.

Karl Sitar, a naturalized citizen of the United States, was arrested in Austria on a charge of violation of the military laws. For some unexplained reason he did not, when arrested, exhibit his American citizenship papers. He was released when he exhibited them. (For. Rel. 1897, 18.)

Mendel Tewel, a naturalized citizen of the United States, was arrested in Austria in consequence of a mistake made in his naturalization papers and passport, in both of which he was described as Mae Tewel. (For. Rel. 1897, 19.)

Case of Paul Schwabek involving no principle. (For. Rel. 1897, 21.)

Ignatz Gutman, a naturalized citizen of the United States, of Hungarian origin, on his return to his native country voluntarily enlisted in the army. Subsequently becoming tired of the service, he sought to be discharged; and, on the strength of representations that he had been forced into the army, the legation of the United States at Vienna was instructed to ask for an investigation of the case, with a view to his release. The legation finding, by an inquiry into the circumstances, that he was not only not arrested for nonperformance of military duty, but that, after being rejected as a conscript on the ground of his American citizenship, he was accepted as an enlisted man for three years on his own application, forbore to present the case to the foreign office and reported it for instructions. The course of the legation was approved.

For. Rel. 1898, 37-46.

See Mr. Moore, Assist. Sec. of State, to Messrs. McKinley and Gottlieb, May 26, 1898, 227 MS. Dom. Let. 654, For. Rel. 1898, 45.

Aaron Kenig, a citizen of the United States, was arrested in Austrian Galicia in December, 1897, on a charge of attempting to assist an Austrian subject to leave the Empire without a permit in order to evade his obligation to perform military duty. Kenig, who was born in Roumania in 1863, emigrated to the United States in 1883 and was naturalized in 1892. In May, 1897, he revisited Europe, and in November of the same year was married at Busk, in Austrian Galicia. Setting out in December with his wife for his home in America, he took with him a cousin of his wife, a youth of eighteen

years named Taeger, whose passage he agreed to pay. On reaching the Austrian frontier the authorities accepted Mr. Kenig's passport, which was issued in Washington in May, 1897, as a sufficient identification of himself and his wife, but immediately arrested Taeger, who had not obtained the permit which is necessary to enable an Austrian subject to cross the frontier, and who had no document of any kind to exhibit. Taeger was sent back to his home at Busk, while Kenig was bound over to answer the charge above stated, his money and passport being taken from him and held by the authorities as a sort of bail for his appearance before the district court at Taworzno. When he appeared there, he was advised that the case had been transferred to the circuit court at Zloczow, and he was ordered there for trial. He did not appear, however, but proceeded to Vienna and made a complaint to the United States legation. He admitted that he was paying Taeger's passage to the United States, and intimated that if he could obtain sufficient money he would disregard the summons of the court and go directly to America. In January, 1897, he notified the legation by mail that he had taken this course. The legation then made a statement of the case to the imperial minister of foreign affairs, requesting that "justice" be done, and that Kenig's passport and money be returned to him. It appeared by the imperial minister's reply that the money and passport were held pending a final determination of the case, and that the money would be used either wholly or in part to pay the costs of the legal proceedings.

The Department of State approved the purpose of the legation "to press for an immediate disposal of the case, and for the return in whole or in part of the money belonging to Mr. Kenig;" but added: "If the action of the Austrian court in retaining the funds taken from Mr. Kenig with the object of defraying from them the cost of the proceedings against him in the event of his conviction is in accordance with Austrian law, as is alleged, the Department would not be disposed to contest the claim. Under our system of law the money would probably not be taken from one accused of such an offense upon his arrest, but it does not follow that such practice founded upon the law of a country is not proper and valid."

Mr. Hay, Sec. of State, to Mr. Herdliska, chargé at Vienna, March 4, 1899, For. Rel. 1899, 22.

See, for the legation's report on the case, For. Rel. 1899, 11-14.

The circuit court at Zloczow, February 11, 1899, decided, on motion of the state's attorney, to withdraw the action against Kenig and to return to him his money and passport, which was done. (For. Rel. 1899, 23, 24.)

November 7, 1899, the Austrian legation at Washington presented to the United States a proposal for a modification of the naturaliza-

tion treaty of September 20, 1870. The reason given for the proposal was that for a number of years a numerous class of people in Austria-Hungary had been making use of the stipulations of the treaty for becoming nominally citizens of the United States, with the sole object of living in Austria-Hungary in defiance of its military laws. After having obtained naturalization in the United States at an early age they had, said the Austrian Government, returned to the country of their origin intending to live there permanently, but invoking their American citizenship when called upon to fulfill military duty. "The United States Government," said the Austrian proposal, "can have no possible interest in the acquisition of a class of citizens who fulfill none of their duties of citizenship toward them, and look upon American citizenship merely as a loophole to avoid the laws of the country in which they intend to live. Nevertheless, they feel obliged to extend their protection to these *mala fide* citizens, and the Austro-Hungarian Government, bound by the stipulations of the treaty, had no other way to escape from the demoralizing influence of these people but by expelling them, in virtue of the right of every government to close its territory against undesirable aliens." It was therefore proposed (1) that the obligation to recognize naturalization under article 1 of the treaty should be made conditional on the act of expatriation not having taken place in contravention of the laws of the country of origin, or (2) that the stipulation that naturalized persons remained liable to trial and punishment for acts committed before their emigration should be freed from the restriction imposed in article 2 of the treaty, which provides that a citizen of the Austro-Hungarian monarchy, naturalized in the United States, shall not, on his return to his original country, be held to military service or remain liable to trial and punishment for the nonfulfillment of military duty.

The United States declined to accept the proposal on the ground that either amendment would annul all the beneficial provisions of the treaty relating to subjection to military duty. It was admitted, however, that there were "doubtless grave abuses of the privileges of naturalization."

For. Rel. 1890, 79-80.

See, in a similar sense, as to prior proposals of a like kind, Mr. Frelinghuysen, Sec. of State, to Mr. Taft, min. to Aust.-Hung. No. 48, Aug. 25, 1883, MS. Inst. Aust.-Hung. III. 252; Mr. Wharton, Act. Sec. of State, to Mr. Grant, min. to Aust.-Hung. No. 140, Aug. 20, 1891, MS. Inst. Aust.-Hung. III. 622.

"The Department is quite of opinion that an attempt to make use of the treaty merely for the purpose of escaping the burdens which may be involved in bearing allegiance to either of the contracting parties should be discontinued." (Mr. Blaine, Sec. of State, to Mr. Grant, min. to Aust.-Hung. May 16, 1890, For. Rel. 1890, 15.)

## (2) PRACTICE OF EXPULSION.

## § 399.

"The chargé d'affaires *ad interim* of the United States of America has the honor to invite the attention of his excellency Count Kalnoky, imperial and royal minister of foreign affairs and of the imperial household, president of the council, to the inclosed copy of an order of expulsion addressed to Mr. Antonio Chirighin, a naturalized citizen of the United States.

"According to Mr. Chirighin's statement to this legation, he, an Austrian subject, left his country in 1868, emigrated to the United States, and after a residence of eleven years was naturalized and became a citizen of the United States.

"Having some family business to attend to at Merce, in the island of Brazza, Dalmatia, he returned to Austria-Hungary, apparently quite recently, as his passport is dated at Washington, July 26, 1886.

"His conduct does not appear to have been in any manner subject to criticism, and his only offense, as your excellency will see by the inclosed order of the local authorities, seems to have been that he has availed himself of the privileges distinctly accorded to the subjects of Austria-Hungary by the convention between Austria-Hungary and the United States of 1870 relating to naturalization.

"The undersigned believes that on an examination of the subject his excellency the imperial and royal minister of foreign affairs will cause to be issued such instructions as will secure to Mr. Chirighin such hospitality and protection as is accorded by the United States to subjects of Austria-Hungary visiting that country for purposes of business or pleasure, and such as will enable him to transact freely and fully that business which caused his visit to the province of Dalmatia."

Mr. Lee, chargé at Vienna, to Count Kalnoky, Sept. 25, 1886, For. Rel. 1887, 14.

The order of expulsion reads as follows:

"To ANTONIO CHIRIGHIN, of *Girolamo, Merce*:

"As a result of the suggestion of the 3d of September, 1886, which contained four propositions, the I. and R. district captain decides to inform you that, according to the interpretation of the last line of Article II. of the state treaty of 20 September, 1870, B. L. I. 1871, No. 74, no penal procedure will be taken against you concerning your military (conscriptional) duties.

"Considering, however, that the obtaining of the rights of American citizenship does not exclude the idea (point) that it was but a subterfuge to release you from the duties of the conscription which were imposed upon you by law as a citizen of Austria;

"In view that the adoption of such a course might serve as a public scandal and suggest to others to follow the bad example:

"I, by these presents, invite you to take *immediately* the steps necessary to reacquire your original (ancient) citizenship, and subsequently to present yourself voluntarily to answer the requirements of the law of conscription, or, on the other hand, to quit the countries represented in the councils of the Austrian Empire; to which end I name the 1st day of October of this year as the last day for your sojourn in those countries; this date having elapsed without your having departed, it will become my duty to proceed, out of respect for the public order, against you according to the fifth line of paragraph 2 of the law of July 27, 1871 (B. L. I. No. 88); that is to say, I must proceed to your expulsion from the above-named countries.

"The inclosed 38 soldi are the residue of the money paid by you in advance for the purpose of telegraphing to the gendarmerie at San Pietro.

"SPALATO, 3 September, 1886.

"The I. and R. district captain,

"TRUXA."

"The order of expulsion admits the fact of American citizenship, and, by giving the alternative of leaving the country or reassuming the former status of Austrian citizenship, seems also to admit not only that Mr. Chirighin has committed no offense against the laws of the Empire since his return, but that he is a desirable person to have as a citizen.

"His only offense appears, from these papers, to be that he became an American citizen without having fulfilled the obligations of the Austrian conscription laws, and returned to his former home.

"The difficulty and delicacy of this class of cases arises from the undoubted legal rights possessed here by the chief local officers to decree, in the exercise of their police duties, the expulsion of any foreigner who disturbs, or who they believe will disturb, the public weal.

"While I should not feel disposed to dispute the right of one government to expel the citizens of another country for cause, I do not see that we can accept as sufficient cause the doing of acts which our treaty provides shall be legal.

"The order having been brought to my official notice, I deemed it proper to assert, in the broadest way, our treaty rights, . . . and I hope that the course pursued may meet with your approval."

Mr. Lee, chargé at Vienna, to Mr. Bayard, Sec. of State, Oct. 4, 1886, For. Rel. 1887, 13. "Your course is approved by the Department."  
(Mr. Bayard, Sec. of State, to Mr. Lee, Nov. 3, 1886, For. Rel. 1887, 16.)

"My action in the case as therein reported has resulted in the rescinding of the said order of expulsion, I have informed Mr. Chirighin of the result and cautioned him to be very prudent in his conduct, as I believed it would not be possible to secure a like result a second time in the same case." (Mr. Lee to Mr. Bayard, March 1, 1887, For. Rel. 1887, 18.)



Hugo Klammer was born in Vienna, Austria, in 1859, and came to the United States in 1873 at the age of fourteen. In 1883, when nearly twenty-four years old, he was naturalized. In 1885, owing to the advanced age of his father, he returned to Vienna. He was twice subsequently called upon to appear before the authorities as a fugitive from military service, but upon exhibition of his certificate of naturalization the proceedings against him were discontinued. In 1887 his father died and he and his brother undertook the settlement of their deceased parent's business. On January 15, 1889, the imperial-royal director of police issued an order under paragraph 323 of the penal code of 1852, directing his expulsion on or before the 27th of that month. When the case was brought to the attention of the Austrian Government, the imperial-royal foreign office stated that Klammer, before he was naturalized, had received three calls for military duty in Austria; that he was not, however, to be punished for nonfulfillment of military duty, but that his expulsion was "decreed on the ground of public order, a right which every government must reserve for itself." The foreign office adhered to this view, although the time of Klammer's expulsion was afterwards postponed till September 1, 1889. The Department of State expressed the opinion that under all the circumstances of the case, including Klammer's early emigration to the United States, his long residence there, and the object of his return to and residence in Austria, his expulsion was not justified, and the legation was instructed to bring the matter to the attention of the imperial-royal ministry for foreign affairs in that sense.

Mr. Lawton, min. to Austria-Hungary, to Mr. Bayard, Sec. of State, March 2, 1889, For. Rel. 1889, 21; Mr. Blaine, Sec. of State, to Mr. Lawton, March 22, 1889, id. 23; Mr. Lawton to Mr. Blaine, April 13, 1889, id. 24; Mr. Blaine to Mr. Grant, min. to Austria-Hungary, Oct. 8, 1889, id. 27.

In this, as in other and subsequent cases, the action of the Austro-Hungarian Government was based, not upon any allegation of offence within the terms of Art. II. of the naturalization treaty of 1870, but upon the allegation that the individual did in fact leave Austria with a view to avoid military service and that his presence in that country was undesirable. (See Mr. Adee, Act. Sec. of State, to Mr. Hunter, April 12, 1895, 201 MS. Dom. Let. 480.)

David Hofmann was born in Bohemia March 21, 1864. In July, 1883, when nineteen years of age, he emigrated to the United States, where he became a naturalized citizen. Eleven years after his emigration he returned, in May, 1894, to his native country. Two months later, in July, he was ordered by the district authorities to leave the country within eight days "for reasons of public welfare," since it was "contrary to public peace and order that persons who have evaded the military law in this manner should sojourn in this coun-

try." The governor of the province, in dismissing an appeal from the order of expulsion, declared that the reasons given for the order were justifiable. Mr. Tripp, minister of the United States at Vienna, in reporting the case, said:

"My own convictions are very strong in this matter, that every nation has the right to bar its doors against obnoxious citizens of other nations for reasons which to itself may seem sufficient, without cause of complaint on the part of the nation whose citizen is thus debarred. We have assumed the right in case of China and in particular classes of cases in reference to the citizens of other countries. I am disposed to think the reasons that Austria-Hungary gives for closing her doors to former citizens who have openly evaded her military laws a good one. It is an undeniable fact that hundreds of young Austro-Hungarian citizens approaching the age of military service emigrate to America, and, remaining there just long enough to acquire citizenship, return again to their native country to permanently reside, resuming their former citizenship and allegiance to the Government in everything but its military laws. Many of these returned *pseudo*-Americans are loud in their defiance of the military power, and openly and shamelessly boast of their smartness in being able to enjoy all the privileges of a government without being obliged to share its burdens or responsibilities. The example of these 'Americans' before the young men of the country, to say nothing of their teachings and boastful assertions of immunity, is pernicious and against public order and ready obedience on the part of the citizens to the necessarily harsh enforcement of the military laws of this Government. I have seen very much of these 'American' citizens during the past year. Many of them are married and in business here; they have no intention of returning to America; they own no property, and they pay no taxes in America; they have not even the ties of family or friendship to bind them to their adopted country; their citizenship is a fraud, a fraud against their adopted as well as against their native country. In time of peace they burden us with their claims of loyalty; in time of war they deny their assumed allegiance and claim, by abandonment, a restoration of their civil rights to which they are entitled by birth."

Mr. Tripp, min. to Austria-Hungary, to Mr. Gresham, Sec. of State, Aug. 13, 1894, For. Rel. 1894, 30-32.

The view taken by the Austrian Government of the general question, as expressed in a note written to the United States legation in an analogous case, was as follows:

"The expulsion took place in conformity with article 2 of the law of July 27, 1871, because his stay in Austria was considered inconsistent with public order.

- "Not coming under the provisions of 1, 2, and 3 of Article II. of the treaty of September 20, 1870, he was not, on his return to Austria, held to perform military service. The treaty has therefore not been violated, inasmuch as his United States citizenship was recognized.
- "The above-mentioned treaty, however, does not deprive the imperial and royal government of the right to issue a decree of expulsion against any foreigner whose stay in the country may be considered as being inconsistent with public peace. In the present case the United States citizenship was obtained with the evident intention, or at least with the full knowledge, of avoiding by so doing the performance of the duties of an Austrian subject, under the protection of the treaty of September 20, 1870.
- "The naturalization took place, therefore, when regarded from an Austrian legal point of view, doubtless *in fraudem legis*.
- "The provisions of the Austrian military laws of October 2, 1882, were not framed until after the treaty of September 20, 1870, had been concluded. The result is that the United States Government does not always judge the proceedings of the authorities here against former Austro-Hungarian subjects from the same point of view, however justified the measures may be, according to our laws." (For. Rel. 1894, 35.)

The decision of the Department of State was as follows:

"Hofmann, having come to this country a short time before he arrived at the age for military service in Austria, is, by the terms of the treaty of 1870, exempt, upon his return to that country, from trial and punishment for nonfulfillment of military duty.

"There is, however, nothing in the treaty or in the general principles of international law to prevent the Austro-Hungarian Government from expelling Hofmann, upon his return there, under the circumstances of his case, 'for reasons of public welfare.' The expulsion seems to have been made after due judicial examination into the facts, and without any circumstances of harshness or oppression.

"I can see no ground for exception or protest against the action of the Austro-Hungarian authorities."

Mr. Uhl, Acting Sec. of State, to Mr. Tripp, min. to Austria-Hungary, Sept. 4, 1894, For. Rel. 1894, 36.

See, as to the case of Hugo Klammer, For. Rel. 1890, 15; *supra*, p. 418.

Gustav Wolf Louis Fischer was born in Saxony, July 14, 1868. On the death of his father his mother removed to Vienna, where he was naturalized as an Austrian subject, November 17, 1885. In March, 1888, he was notified to appear for military duty, but on examination was pronounced unfit for service. He then went to the United States, where, December 5, 1893, he was naturalized. March 2, 1895, he obtained a passport and returned to Vienna. Early in 1900 he was summoned before a district magistrate and ordered to be banished. From this order he appealed to the governor of Lower Austria. At this point the minister of the United States at Vienna interposed, and

asked that the order of expulsion be revoked. The Austrian Government stated that Fischer, at the time of his emigration, was classified as a person "remanded," and was under an obligation to report for a later examination. It was admitted that his naturalization was valid under the treaty of September 20, 1870, but it was maintained that his expulsion was not to be considered as a punishment, but as an administrative measure. It was, said the Austrian Government, a measure inspired by "consideration for public order, and is based on the belief that the latter suffers offense when a person, by assuming foreign citizenship, avoids performance of those duties to his country which are placed upon him as upon all his fellow-citizens, and then, protected by this new citizenship from the punishment otherwise resultant from this avoidance of duty, returns and settles permanently in the midst of his former countrymen, who find themselves in a condition not so favorable as is his. Such an act is not only provocative of discontent in all those who fulfill their obligations to the state, be their fulfillment voluntary or compulsory, but it acts also as a bad example, and, were such proceedings unchecked or of frequent occurrence, would work positive harm to the defensive power of the state. . . . The offensive impression and the corruptive influence of the action under discussion lie in the *extreme conditions* under which Fischer, who was still pledged to duties to the state in this country, accomplished his naturalization in America, and also in his return here to settle in Austria. It is immaterial whether the intention to return, after avoiding military duty, was already formed in his mind, as it is in a majority of such cases, or whether the intention to return, perhaps originally nonexistent, was formed at a later date."

Count Szecsen, ministry of for. aff., to Mr. Harris, Amer. min., June 5, 1900, For. Rel. 1900, 21, 22.

Commenting upon this note, the Department of State observed that "the weakness of this position is that it does not rest upon any averment of offensive conduct on Mr. Fischer's part which would justify the individual application in his case of the right of expulsion, but, rather, appears to lay down a general principle whereby the expulsion of every American naturalized Austro-Hungarian, who was under admitted liability to serve at the time of emigration, would be a necessary proceeding under the general policy of the state. Such a sweeping doctrine would to a serious extent neutralize the provisions of our naturalization treaty with Austria-Hungary. That instrument, weighing all the circumstances under which persons of military age might emigrate without fulfillment of their obligations, discriminated between the classes securing immunity by naturalization and those not so securing it. It can not be expected that this Government will acquiesce in a comprehensive enlargement of the nonim-

mune class by the *ex parte* act of the other contracting party." It was also observed that, so far as the Austrian answer dealt with the merits of the case, it comprised two distinct propositions—Mr. Fischer's action prior to his naturalization and his action since. The first, as had been stated, was covered by stipulations of the treaty, and the second, which imputed to him an intention to settle in Austria, brought his case within article 4 of the treaty, which seemed to import that a naturalized citizen might reside indefinitely in the country of his origin without incurring any disability and without being obliged to resume his original citizenship. The Department of State further said: "Mr. Fischer, it now appears, has asked that the order of expulsion be postponed until September, and his petition has been granted. This arrangement may be deemed to embrace a voluntary engagement on his part to quit Austro-Hungarian territory by a given date, and he will be expected to abide thereby, . . . the principles upon which this Government rests in contesting the general claim of the Austro-Hungarian Government . . . being in no wise prejudiced by Mr. Fischer's action. . . . You should make our views upon this point and upon the broader point of expulsion for individual cause clear to the minister of foreign affairs."

Mr. Hay, Sec. of State, to Mr. Harris, min. to Austria-Hungary, July 19, 1900, For. Rel. 1900, 22.

See, also, Mr. Hay, Sec. of State, to Mr. Harris, min. to Austria-Hungary, April 13, 1900, For. Rel. 1900, 18.

The Government of Austria-Hungary having stated that the treaty of September 20, 1870, contained no provision granting to American citizens the right to remain, and particularly the right to remain indefinitely, in Austria, and that their right to remain was therefore subject to the laws of the country, according to which (particularly Clause V., par. 2, law of July 27, 1871) persons who are not Austrian subjects may "be expelled from the entire territory or from part thereof, if their stay, for reasons of danger to public order or security, is objectionable," the United States observed that the question whether naturalized citizens of the United States of Austrian origin might be expelled from Austria, as well as the question when they might be so expelled, would seem to depend upon the particular circumstances of each case; that the United States maintained that the "pernicious character of the returning person should be affirmatively shown in justification of the extreme resort to expulsion, and that the right so claimed should not rest on a vague and general theory of inconvenient example which might be stretched to cover the cases of all Austro-Hungarians naturalized here, and returning to their original jurisdiction;" that the treaty undoubtedly gave the right of inoffensive return, and that this stipulation was not to be

impaired by construction. The Austrian foreign office had alleged as the ground of expulsion in the case under consideration that "the ostentatious manner in which he [John Richter] evaded his legal duty to do military service is causing public scandal and may very easily give others an impetus to similar demoralizing acts." As Richter was only 14 years of age when brought to the United States and would not have been subject to military duty till he reached the age of 19, it might, said the Department of State, be questioned whether he left for the purpose of evading such duty. In view of the fact, however, that Richter had been informed by the Austrian authorities that he might return to the place from which he was expelled, and as he had made no further complaint, it was not deemed desirable to take up the case with the Austrian Government.

Mr. Hay, Sec. of State, to Mr. Herdliska, chargé at Vienna, July 9, 1901, For. Rel. 1901, 10.

"While the Austro-Hungarian Government has in the many cases that have been reported of the arrest of our naturalized citizens for alleged evasion of military service faithfully observed the provisions of the treaty and released such persons from military obligations, it has in some instances expelled those whose presence in the community of their origin was asserted to have a pernicious influence. Representations have been made against this course whenever its adoption has appeared unduly onerous." (President McKinley, annual message, Dec. 3, 1900, For. Rel. 1900, xvi.)

For paragraphs 1 and 2 of the Austrian law of July 27, 1871, regulating expulsion by the police, see For. Rel. 1892, 13.

#### 6. DENMARK; ECUADOR.

### § 400.

Treaties of naturalization were concluded by the United States with Ecuador, May 6, 1872, and Denmark, July 20, 1872.

## VI. NATURALIZATION NOT RETROACTIVE.

### 1. GENERAL PRINCIPLES.

### § 401.

The decree of naturalization does not operate retroactively.

Ex parte Kyle, 67 Fed. Rep. 306; *State v. Boyd*, (Neb.) 48 N. W., 739; *Dryden v. Swinburne*, 20 W. Va. 89; *Wulff v. Manuel* (Mont.) 23 Pac. 723.

A person who was born a citizen of Mexico, and lived on the east side of the Rio Grande, in New Mexico, at the time of the treaty of Guadalupe-Hidalgo, can not maintain an action for an Indian

depredation which occurred prior to his becoming a citizen of the United States in the manner provided by the treaty.

*De Baca v. United States* (1901), 36 Ct. Cl. 407. This case contains an elaborate discussion of the boundaries of Texas.

“The change of national character subsequent to the alleged offence does not release an offender from penalties previously incurred when legally brought within the jurisdiction of the country whose laws have been violated.”

Mr. Marcy, Sec. of State, to Mr. D'Oench, Nov. 16, 1853, 42 MS. Dom. Let. 54. See, to the same effect, Mr. Marcy, Sec. of State, to Mr. Marle, Feb. 20, 1854, 42 MS. Dom. Let. 228; to Mr. Nell, March 3, 1854, id. 260; to Mr. Jackson, chargé at Vienna, Nov. 6, 1854, and April 6, 1855, MS. Inst. Austria, II. 103.

“When an alien who has been naturalized in the United States voluntarily returns to his native country with legal obligations contracted before he left there, the naturalization is not held to absolve him from those obligations if the government or individual to whom they may be due shall think proper to enforce them.”

Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 37, Dec. 26, 1856, MS. Inst. Prussia, XIV. 242; adopted by Mr. Cass, Sec. of State, to Mr. Wright, min. to Prussia, No. 4, Oct. 16, 1857, MS. Inst. Prussia, XIV. 252.

See, also, Mr. Marcy, Sec. of State, to Mr. Florence, M. C., Feb. 17, 1857, 46 MS. Dom. Let. 338; Mr. Cass, Sec. of State, to Mr. Fisher, Dec. 14, 1857, 48 MS. Dom. Let. 30; Mr. Fish, Sec. of State, to Mr. Fisher, July 8, 1870, 85 MS. Dom. Let. 260; to Messrs. Shorter & Brother, March 13, 1873, 98 MS. Dom. Let. 129; Mr. Frellinghuysen, Sec. of State, to Mr. O'Reilly, Dec. 10, 1884, 153 MS. Dom. Let. 394.

A naturalized citizen requested interposition for relief from a fine imposed by the authorities of his native place for his alleged unlawful emigration. The fine was imposed Jan. 11, 1870; the naturalization took place April 11, 1870, three months later. On this ground, the Department declined to interfere. (Mr. Fish, Sec. of State, to Mr. Etschmann, May 2, 1870, 84 MS. Dom. Let. 379.)

While a naturalized citizen who returns to his native country is liable, like any other person, to be arrested for a debt or a crime, he can not rightfully be punished for the nonperformance of a duty which is supposed to grow out of his abjured allegiance. An arrest of a former subject, who has become naturalized in the United States, can not be justified on the ground that he emigrated contrary to the laws of his original country.

Black, *Jul. Gen.*, 1859, 9 Op. 356.

“It is apprehended, however, that the Moorish Government may be mistaken, if it supposes that the effect of the naturalization of the

person adverted to, supposing it to have taken place, would be to weaken his liability for his debts in Morocco, even if he should return to that country. He might, in that case, be prosecuted for them in the consular court, and this Government is bound to presume that impartial justice would there be dispensed."

Mr. Fish, Sec. of State, to Mr. Mathews, Oct. 23, 1872, MS. Inst. Barb. Powers, XV. 311.

"Desertion is an offense from the penalty of which exemption by foreign naturalization is neither claimed nor conceded by the United States or, so far as known, by any other country."

Mr. Bayard, Sec. of State, to Mr. Turner, Sept. 10, 1885, 157 MS. Dom. Let. 109.

See, to the same effect, Mr. Bayard, Sec. of State, to Mr. Bain, April 18, 1885, 155 MS. Dom. Let. 136; to Mr. Manderson, May 19, 1887, 164 id. 213; Mr. Adee, Second Assist. Sec. of State, to Mr. Todd, Dec. 10, 1897, 223 id. 326.

While "desertion from active military service is generally regarded as not condoned by lapse of time or change of nationality," and no official action can be taken in such a case, yet, where a British subject, who deserted from the British army in his youth in 1842, afterwards became an American citizen, and served with distinction in the American civil war, attaining the rank of brevet brigadier-general, the American minister in London was instructed that he might personally present the request of the person in question for the removal of whatever disability might rest on him by reason of his desertion forty-five years before. (Mr. Bayard, Sec. of State, to Mr. Endicott, June 14, 1887, 164 MS. Dom. Let. 626.)

June 17, 1887, on the Queen's Jubilee, a proclamation was issued granting pardon to all deserters from the land forces of England of more than five years' standing, provided the deserter surrendered himself within two months if at home, and within four months if abroad. A person who failed to avail himself of the terms of the proclamation remained amenable to the penalties prescribed by the laws of Great Britain in case of his return. (Mr. Olney, Sec. of State, to Mr. McDowell, June 11, 1895, 202 MS. Dom. Let. 538; Mr. Adee, Second Assist. Sec. of State, to Mr. Todd, Dec. 10, 1897, 223 MS. Dom. Let. 326.)

The crime of desertion is not condoned by law or treaty and generally not by lapse of time, but a person, who deserted from the German army in 1873 and came to the United States and was naturalized, was advised that if he would prepare a petition for pardon in the German language, and send it to the Imperial war office, and then send a copy to the Department of State, the American ambassador at Berlin would be instructed to support it so far as he properly might. (Mr. Hill, Assist. Sec. of State, to Mr. Whelden, June 19, 1900, 245 MS. Dom. Let. 604.)

American citizenship will not exempt a person from trial in Great Britain for the offence of mutiny committed there while a subject of that country. (Mr. Bayard, Sec. of State, to Mr. Willey, April 29, 1885, 155 MS. Dom. Let. 245.)



In 1887 the American legation in Paris presented to the foreign office the case of J. C. Carlin, a naturalized American citizen of French origin, who, prior to his naturalization, deserted from a French merchant vessel in the United States, and who desired to return to France for the purpose of visiting his family. The French foreign office, in its reply, besides referring to the charge of desertion, stated that Carlin belonged to the class of 1876, and, as he did not respond to the call for the army, he was declared, February 15, 1878, to be in a state of *insubmission*. He was therefore, said the foreign office, subject to two penalties, (1) imprisonment from one to three months for the desertion (art. 66, decree and law of March 24, 1852); (2) imprisonment from one month to one year for *insubmission* (art. 61, law of July 27, 1872). These two offences being successive could not fall under the law of limitation, and, as there was nothing in Carlin's prior conduct to justify a favor, permission for his return was refused.

Mr. Vignaud, chargé at Paris, to Mr. Bayard, Sec. of State, Sept. 5, 1887, For. Rel. 1887, 351.

Naturalization can not retroactively affect a penalty imposed before the naturalization took place.

Mr. Adee, Act. Sec. of State, to Mr. Kunze, Aug. 3, 1897, 220 MS. Dom. Let. 38.

Referring to the case of Efraim Rubin, a naturalized citizen of the United States of Austrian birth, who was arrested in his native country for nonperformance of military service, but afterwards released, and who claimed \$9,000 as damages on account of his arrest and imprisonment, and \$3,000 in addition by way of solatium, the Department of State said: "It is not the practice of the Department to present claims arising out of the military arrest and detention of naturalized American citizens who return to the country of their birth."

Mr. Adee, Acting Sec. of State, to Mr. Harris, min. to Austria-Hungary, Sept. 20, 1899, For. Rel. 1899, 75. See, to the same effect, Mr. Hill, Assist. Sec. of State, to Mr. Rubin, July 10, 1900, 246 MS. Dom. Let. 349.

The same rule is laid down in Mr. Hill, Assist. Sec. of State, to Mr. Karlovic, Nov. 21, 1898, 232 MS. Dom. Let. 614.

For a contrary view, in certain earlier instances, see Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Nov. 21, 1876, MS. Inst. Germany, XVI. 264; Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, June 26, 1879, id. 477; and Mr. F. W. Seward, Acting Sec. of State, to Mr. White, min. to Germany, August 27, 1879, MS. Inst. Germany, id. 505.

## 2. GERMAN TREATIES.

## (1) MILITARY CASES.

## § 402.

“The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

“A German subject is liable to military service from the time he has completed the 17th year of his age until his 45th year, active service lasting from the beginning of his 20th year to the end of his 36th year.

“A German who emigrates before he is 17 years old, or before he has been actually called upon to appear before the military authorities, may, after a residence in the United States of five years and after due naturalization, return to Germany on a visit, but his right to remain in his former home is denied by Germany, and he may be expelled after a brief sojourn on the ground that he left Germany merely to evade military service. It is not safe for a person who has once been expelled to return to Germany without having obtained permission to do so in advance. A person who has completed his military service and has reached his 31st year and become an American citizen may safely return to Germany.

“The treaties between the United States and the German States provide that German subjects who have become citizens of the United States shall be recognized as such upon their return to Germany if they resided in the United States five years.

“But a naturalized American of German birth is liable to trial and punishment upon return to Germany for an offense against German law committed before emigration, saving always the limitations of the laws of Germany. If he emigrated after he was enrolled as a recruit in the standing army; if he emigrated while in service or while on leave of absence for a limited time; if, having an unlimited leave or being in the reserve, he emigrated after receiving a call into service or after a public proclamation requiring his appearance, or after war broke out, he is liable to trial and punishment on return.

“Alsace-Lorraine having become a part of Germany since our naturalization treaties with the other German States were negotiated, American citizens, natives of that province, under existing circumstances, may be subjected to inconvenience and possible detention by the German authorities if they return without having sought and obtained permission to do so from the imperial governor at Strassburg.

“The authorities of Würtemberg require that the evidence of the American citizenship of a former subject of Würtemberg which is furnished by a passport shall be supplemented by a duly authenti-

cated certificate showing five years' residence in the United States, in order that fulfillment of the treaty condition of five years' residence may appear separately as a fact of record.

"A former German subject against whom there is an outstanding sentence, or who fears molestation upon return for an offense against German law, may petition the sovereign of his native State for relief, but this Government can not act as intermediary in presenting the petition."

Circular notice, Department of State, Washington, Jan. 23, 1901, For. Rel. 1901, 160.

That a person charged, not with evasion of military service by emigration, but with desertion, remains liable to punishment under Art. II of the treaty with Baden, see For. Rel. 1903, 442.

Natives of Württemberg, who, after being naturalized in the United States, return to their native country, should carry not only American passports, but also their certificates of naturalization. The certificate should be authenticated by the German consul nearest the person's home, and if, as is often the case, it does not state that he has lived five years uninterruptedly or continuously in the United States, he should take with him a written statement that he has so resided, signed and sworn to by two friends before a notary, and the signature of the notary should be acknowledged by the German consul. Besides, if the person in question was not naturalized in his full and exact baptismal name, he should take with him another statement, sworn to and acknowledged in the same manner, to the effect that "Henry ———, who was naturalized on ———, 18—, before the court of ——— at ———, is identical with Heinrich C. ——— G. ——— [or whatever the name may be], son of ——— and ———, who was born at ——— on the ——— day of ———, 18—."

Mr. Johnson, consul at Stuttgart, to Mr. Uhl, Sept. 18, 1895, For. Rel. 1895, I. 518.

See Mr. Olney, Sec. of State, to Mr. Jackson, chargé at Berlin, Feb. 13, 1896, For. Rel. 1895, I. 520-523.

In Germany it is the practice of the local authorities to keep records of the birth and whereabouts of all residents, and it is the duty of every German, upon changing his residence, to inform the authorities, of both his old and his new home, of the fact. From time to time notices are issued for all males of a certain age to report for examination as to fitness for military service. If, after a certain time, anyone has not reported, a judgment of fine or imprisonment, or both, is taken against him and is executed whenever possible. It is this that gives rise to the frequent so-called "military cases." If the person against whom such a judgment is sought to be executed satisfies the local authorities that he has acquired another nationality or has lost his

German nationality, his name is stricken from the list of persons liable to military service, or the judgment is canceled, as the case may be.

By section 1 of the law of the North German Union of June 1, 1870, which was extended, April 22, 1871, to the German Empire, German nationality is acquired through the acquisition of citizenship of any of the federated States and is lost with the loss of such citizenship. By this law the German nationality is lost by ten years' residence abroad, and this loss may be attested by a certificate issued by the authorities of the State of which the individual was a citizen.

For. Rel. 1896, 213-215.

For annual reports on "military cases" in Germany, see the volumes of Foreign Relations of the United States, under the title "Germany."

Robert Weidel, a native of one of the States composing the North German Union, emigrated to the United States in 1868, and in 1873 became a citizen. In 1871 a fine of 50 thalers was imposed on him in Germany, and was paid by his father. In 1874, on his return to Germany, he was arrested. Representations were made by the American legation, and he was released; but repayment of the fine was refused, on the ground that when he emigrated he had already become liable to military service, and that by his emigration he violated the penal law, in consequence of which he was fined before he became an American citizen. On this statement, Mr. Fish held: "If such fine could be lawfully imposed in his absence (and the voluntary payment thereof by his father seems to recognize it), it is difficult to see how his having become a citizen of the United States two and a half years thereafter could give him the right to reclaim the amount . . . In granting the high privilege of its citizenship, the United States does not assume the defense of obligations incurred by the party to whom it accords its citizenship prior to his acquisition of that right, nor does it assume to become his attorney for the prosecution of claims originating prior to the citizenship of the claimant."

Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Nov. 24, 1874, MS. Inst. Prussia, XV. 570.

In the course of the instruction, Mr. Fish said:

"It would be captious to say that this act, viz, his leaving his native country in violation of its laws, was not prior to his emigration. It was a statutory offence, and as concerns him, and his native country, it was committed before he reached the territory of the United States, or could claim any protection from this Government. It would be alike against the comity and friendship due to another and a friendly state, and to the spirit of the treaty, and to the interests of the United States, that this government should assume the defence of those thus violating the enactments of their native land, or should

encourage, by its protection, the recurrence of any violations of the laws which a friendly power prescribes to its citizens.

"It would seem clear, therefore, that the act alleged against Weidel is one for which, under the treaty, a German naturalized in this country remains liable to trial and punishment on his return to his native land.

"But in this case it is not necessary now to decide this general or abstract question. The fine had been imposed on Weidel, and was actually paid in February, 1871, two and a half years before he became a citizen of the United States."

Henry Mumbour, a native of Prussia, entered the army in 1864 and served three years, and was then placed on the reserve rolls. April 1, 1869, in time of peace, he obtained leave of absence for a year and came to the United States. He remained beyond the expiration of his leave; and in the summer of 1870, when the Franco-German war began, and the reserves were called out, was summoned by proclamation to present himself for duty, on pain of being declared a deserter. Knowledge of the proclamation reached him at Pittsburg. He did not respond, but appears then or afterwards to have determined to become a naturalized citizen, which he did at Cleveland, Ohio, in June, 1874. In the following September he returned to Germany, where he was arrested and condemned to a year's imprisonment for desertion. On his trial he admitted that he intended to remain in Germany indefinitely, and had no intention of living permanently in the United States, and the circumstances indicated that his object in becoming naturalized in the United States was to gain protection against prosecution for failing to obey the summons of 1870 when he should return to Germany. The German Government took the ground not only that his admission or declaration of a want of intent to return to America operated as a renunciation of his naturalization, but also, though less clearly, that he was not entitled to the benefit of the provisions of the treaty of 1868 against prosecution for offences occurring after emigration. In reporting the case to the Department of State, Mr. Davis, who was minister to Germany, expressed the opinion that, during the three years in which the German may be in active service, his departure might properly be held to render him liable to punishment for desertion, and that a similar rule might apply where the reserves were actually called out; but that in time of peace, when the reserves were not on duty, the members were free to emigrate to the United States. Mr. Fish, after an examination of the correspondence leading up to the treaty, of the debates in the diet, and of the circulars of the ministers of justice and of the interior of July 5 and 6, 1868, expressed the conclusion that a person "having served the required three years and being placed on the reserve rolls, having emigrated in time of peace, when no exist-

ing obligation to perform military service existed, and having become naturalized in good faith after a residence of five years, and who, although temporarily in Germany, intends in good faith to return and reside in the United States, appears to be secured by the terms of the treaty from punishment for a failure to perform military service when the obligation arises after his emigration." It was true, said Mr. Fish, that Mumbour's leave of absence was for a limited time; but the time was a long one, and the leave was given with intent to allow him to go out of the country. "I have not inquired," observed Mr. Fish, "whether it be provided by German law that a failure to return could under any circumstances relate back and constitute a technical offense at the date leave was obtained. Even if such were true, the treaty fairly contemplates an offence occurring actually, not technically, prior to emigration. Mumbour's resolution not to return and to become naturalized is said to have been taken only in the summer of 1870." In conclusion, however, Mr. Fish said: "Under such circumstances this is an unfortunate case for the presentation of a principle, or in which to hope for advantage from further discussion. As Arndt's case was decided differently, the circumstances of bad faith surrounding this case have not improbably caused the decision. . . . I am, therefore, of opinion that it is not advisable to make Mumbour's a test case, or to assume that in future a similar decision will be made; but it seems to me better, in communicating with the foreign office, to refer to the circumstances which surround the case, and, while regretting the decision, to ascribe it to these surroundings and decline to believe that the German authorities will follow it in future."

Mr. Fish, Sec. of State, to Mr. Davis, mln. to Germany, No. 111, July 21, 1875, MS. Inst. Germany, XVI. 76.

"So far as the knowledge of this Department extends, the effective working of the treaty during the ten years and more of its existence has not proved a hardship to *bona fide* naturalized citizens whose departure from their native land has not been marked by any violation of law, and whose return to Germany has been orderly and for private ends of business or pleasure. In contrary cases it is hardly to be expected that any reciprocal agreement acceptable to both nations would absolutely secure a returning naturalized citizen from the consequences of a punishable act committed on German territory, either prior to his expatriation or subsequent to his return."

Mr. Evarts, Sec. of State, to Mr. Williams, of the House Committee on Foreign Affairs, Feb. 5, 1879, 13 MS. Report Book, 310.

"As a general rule, naturalized citizens of the United States of America of German birth are protected by their American citizenship

from liability to service in the German army when they temporarily revisit that country. The exceptions to that rule are those arising under the second article of the naturalization treaty between the United States of America and Germany; as, for example, when a man has emigrated while in actual service (desertion) or when enrolled for duty and awaiting a call to service; or if, after attaining the age fixed by German law for military service, he is guilty of some act or omission with the design of evading such service.

"It is impossible for this Department to say in advance what molestation naturalized American citizens of German birth may meet with from the authorities of Germany by reason of questions arising as to their liability to military duty there. In case of arrest, however, they may be assured of all proper protection from this Government and its representatives."

Mr. Blaine, Sec. of State, to Mr. Lang, April 7, 1881, 137 MS. Dom. Let. 74.

See Mr. Evarts, Sec. of State, to Mr. Bachrach, March 23, 1877, 117 MS.

Dom. Let. 429; Mr. Evarts, Sec. of State, to Mr. Coke, U. S. S., May 27, 1879, 128 MS. Dom. Let. 263.

"In the cases which have hitherto arisen [of German subjects naturalized in the United States] the payment of the fine has generally been the only penalty exacted from a German evading military service and becoming naturalized in this country. Such fines, however, have as a general rule been remitted in cases where application has been made to that effect by this Government. It is only in extreme cases of actual desertion that military service is exacted."

Mr. Frelinghuysen, Sec. of State, to Mr. Willson, Feb. 19, 1885, 154 MS. Dom. Let. 288.

"If the man in question [who emigrated from Germany after reaching military age, but before being actually put into the army] does not return to Germany he will undoubtedly be fined for absence from his country at the military age, and if the fine is not paid an injunction or attachment would, in the ordinary course of law, be put on his property, or his share of his parents' property which is fixed by law. If he does not at present return to Germany, the fine will eventually (7 years) expire by limitation, but in the meantime the property can not be divided. His right to his inheritance would not be absolutely forfeited, according to the understanding which this Department has of the German law."

Mr. Bayard, Sec. of State, to Mr. Endicott, May 22, 1885, 155 MS. Dom. Let. 476,

"Your letter of the 10th ultimo, stating that you left Germany in 1880; that you have purchased land in Washington Territory; that

you intend to become a naturalized citizen of this country as soon as you reach the age of twenty-one years, and enquiring whether, under these circumstances, you or your people in Germany can be punished on account of your failure to respond to a notice to return to your native country to perform military service, has been received.

"In reply I have to inform you that it is understood that the German authorities can do nothing more than to place an attachment upon any estate your parents may leave, to prevent its being divided until your military fine has been paid. This attachment would expire in seven years by limitation. Under these circumstances your parents need not pay the fine which will be assessed against you."

Mr. Bayard, Sec. of State, to Mr. Authes, August 7, 1885, 156 MS. Dom. Let. 482.

"You will be [if a deserter] liable to punishment on your return to Germany. If, however, you have merely been fined for emigration without permission, the fine can be released by the intercession of our legation at Berlin." (Mr. Bayard, Sec. of State, to Mr. Brauer, Feb. 9, 1886, 159 MS. Dom. Let. 15.)

Jacob Gallewski was born in Germany, September 21, 1858. In July, 1873, he emigrated to the United States, where he was naturalized May 5, 1884, under the name of Jacob Phillips. In the same month he returned to his native place, where, in 1887, he was compelled to pay fines and costs for alleged evasion of military duty. The case was brought to the attention of the German Government, with the request that it be investigated and that the amount of the fines and costs be returned, together with the citizenship papers. The German Government replied that it was not considered feasible to repay the fines and cancel the costs, and gave as a reason for this decision (1) that the sentence under which the fines were collected was pronounced by a royal Prussian court on March 20, 1884, when Gallewski was "still a Prussian subject;" (2) that when the fines were collected he had already sojourned in Germany beyond the two years mentioned in Article IV. of the treaty of February 22, 1868; and (3) that besides, on April 29, 1887, he formally declared before the proper Prussian authorities that he intended to remain permanently in Germany, and divested himself of all rights as an American citizen.

Mr. Pendleton, mln. to Germany, to Count Bismarck, April 5, 1887; Count Berchem to Mr. Pendleton, July 20, 1887; Mr. Pendleton to Mr. Bayard, July 22, 1887: For. Rel. 1887, 397-398.

April 13, 1888, Ludwig Walter, a native of Alsace, was sentenced by the land court at Saargemünd to pay a fine of 600 marks and costs of the proceedings, for failure to appear and perform military duty.



The costs amounted to nearly 100 marks. Of the whole amount due, 540.92 marks were collected out of his share of his mother's estate. In 1891 the authorities, on the petition of Walter's attorney, remitted, as an act of grace, the remainder of the fine, amounting to 147.34 marks; but they declined to return the sums already collected.

Mr. Phelps, min. to Germany, to Mr. Blaine, Sec. of State, No. 431, April 25, 1892, enclosing copy of a note of the German foreign office of April 21, 1892, 53 MS. Desp. Germany.

See Mr. Wharton, Act. Sec. of State, to Mr. Phelps, No. 438, June 29, 1892, 18 MS. Inst. Germany, 595.

"If Mr. ———'s interest in any estate he may have inherited in Germany has been attached by the German authorities for the payment of any military fine which may have been assessed against him, it is possible, but not certain, that he might be able to obtain the release of the property through the intervention of our embassy at Berlin.

"If Mr. ——— desires to make application for the release of his property, the Department will bring the matter to the attention of the German Government upon being furnished with a copy of his certificate of naturalization and with an affidavit setting forth the facts of the case, with a view to such action as the circumstances may be found to warrant."

Mr. Day, Assist. Sec. of State, to Mr. Dygert, March 29, 1898, 227 MS. Dom. Let. 36.

See Mr. Frelinghuysen, Sec. of State, to Mr. Weniger, Dec. 23, 1884, 153 MS. Dom. Let. 502.

"Your No. 1665, of the 10th instant, reports that Paul N. Friedlaender, a native of Germany, was naturalized at Chicago May 28, 1897, after having resided in the United States for a full term of five years; that his mother was called upon about a year ago to pay a fine on his account, and that the embassy had addressed the foreign office asking the refunding of any money already paid on account of his failure to report for military service, and the cessation of all proceedings against him which may have been taken on the same account and his recognition as an American citizen. . . . You further state that Friedlaender had been sentenced to pay a fine or suffer imprisonment by the judgment of a local court April 10, 1900, on account of his unauthorized emigration; that the German foreign office has advised that Friedlaender petition the Emperor directly for a vacation of the judgment or remission of the penalty, and suggested that in order to expedite matters his petition be supported by the embassy, which the latter declined to do for the reason that the case is governed by the naturalization treaty of 1868 and by the two ministerial decrees of July of that year, and that since the Prussian

minister of justice has decreed that the penalty for punishable emigration is not to be executed there would appear to be no reason for a formal petition of pardon.

"To this the foreign office replied, advising that Friedlaender send in a petition before coming to Germany, as otherwise a demand for payment will be made upon him and difficulties for him will arise therefrom, as then the remission of the penalty will not at that time have been introduced in the official way.

"You express doubt whether you should give support to any petition by Friedlaender, as by so doing it might be construed as an admission of the correctness of the position taken by the foreign office, rendering it necessary to pursue the same course in respect of every American citizen of German origin desiring to visit his former home.

"The naturalization convention of 1868 provides:

"ARTICLE I. Citizens of the North German Confederation who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years shall be held by the North German Confederation to be American citizens and shall be treated as such. This article shall apply as well to those already naturalized as those hereafter naturalized.

"ARTICLE II. A naturalized citizen of the one party remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration, saving always the limitations established by the laws of his original country.

"ARTICLE IV. If a German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States. . . . The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.

"The circular of the minister of justice, dated July 5, 1868, states that it was the prevailing intention of the treaty that in conformity with its second article the punishment incurred by punishable emigration is not to be brought to execution on occasion of a return of the emigrant to his original country if the returning emigrant has obtained naturalization in the other country in conformity with the first article of the treaty.

"The circular of the minister of the interior, dated July 6, 1868, states that it was the prevailing intention of the treaty that in conformity with Article II. of the treaty the punishable action committed by the unauthorized emigration of a citizen of the confederation to the United States of America should not be made the ground for a penal prosecution upon the return of such person to his former country after absence of not less than five years, and that the punishment for such action, even though already legally declared, should not be consummated if the person has acquired in America the right of citizenship in conformity with Article I. of said treaty.

"A state has the unquestionable legal right to regulate under penalties either the emigration of its subjects or the immigration of aliens, as also to punish its nationals for failure to report for military service, except so far as restrained by treaty. (1 Rivier, 269; 2 Wharton, sec. 171.)

"A state does not, however, necessarily take official notice of the naturalization of its subjects as citizens of another state. Consequently, in the absence of such official knowledge, it may, if authorized to do so by its own laws, proceed against them by judicial trial and condemnation, even in their absence. With such treatment by it of its own subjects no other state has any concern.

"As the case is stated, Friedlaender was a native-born German subject and appears to have been condemned as for punishable emigration. If he had received permission to emigrate, the judgment was not unlawful, though erroneous in point of fact, unless the fact was shown at the trial; if he had not received such permission, it was not unlawful unless at the trial proof was submitted showing his naturalization in the United States and his compliance with the terms of the treaty. As the case is stated, it does not appear that the judgment was unlawfully rendered, although erroneous. And as the German court or Government would not know this error without evidence of the facts which brought Friedlaender within the exemption of the treaty, it is entirely proper that he should take steps before the court to have the judgment vacated and set aside, on proof of the facts which would have constituted a good defense of the action if they had been presented at the trial, or that he should petition the Emperor to vacate the judgment, submitting the facts and proofs necessary to show that the judgment was in fact given in violation of the treaty.

"While this may result in some inconvenience in practice, it is the course pursued in the United States in analogous cases. If a judgment by default has been rendered against a person during his absence, provision is usually made for his application to the court, within a given period, to have the judgment set aside for error of law or fact. If a person has been condemned as a criminal, he may have judicial proceedings to correct an erroneous conviction, and in the last instance may appeal to the Executive to grant a pardon.

"The advice of the German foreign office that an appeal be made to the Emperor to set aside the judgment on the grounds stated in your dispatch, so far from involving a concession that the conviction was not erroneous in fact, may be accepted in the sense that it was erroneous because rendered in violation of the treaty, as authentically interpreted in the circulars. A pardon would be inappropriate as implying a guilt which is shown not to exist in fact, yet if this is the only

way the Emperor can lawfully proceed, the proceeding should be accompanied by you with this interpretation.

"The better course in all such cases is for the naturalized American to have proceedings instituted in the proper court to vacate the judgment, if such remedy is given by the local laws; and in all cases if they have notice they should make defense by counsel if allowable to suits of that character while pending. They should not burden the embassy by asking it to relieve them from the consequences of their own neglect to defend; but it is, of course, proper for you to render them all necessary assistance, even when they could have avoided trouble by timely attention to their own interests."

Mr. Hill, Acting Sec. of State, to Mr. White, amb. to Germany, July 26, 1901, For. Rel. 1901, 181.

## (2) STATUTES OF LIMITATION.

### § 403.

By the treaty of naturalization with the North German Confederation, it is provided that crimes committed before emigration may be punished on the return of the emigrant, saving always the limitation established by the laws of his original country. The naturalization treaties with the other German States add the words "or any other remission of liability to punishment." Bavaria adds to this that the returned emigrant is not to be made punishable for the act of emigration itself, and Baden makes special provision concerning trial and punishment for nonfulfillment of military duty.

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873, For. Rel. 1873, I. 279, 280.

"It is true that the treaties with the four South German States expressly add in words that the returning emigrant shall be safe from punishment in all cases when a resident citizen enjoys such an immunity, but those forms of remission of liability to punishment, other than that of limitation, exist only by public acts, and are as such enjoyed by everybody, naturalized or native citizen of a foreign country, who comes to Germany. . . . Thus the five treaties are on this point absolutely identical." (Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873, For. Rel. 1873, I. 284, 287-288, where the reasons for this statement are given.)

In an instruction to the legation at Berlin, May 21, 1887, Mr. Bayard stated that it appeared by a dispatch from the legation, No. 95, of March 21, 1879, published in Foreign Relations for 1879, page 373, that by the law of Württemberg, where property was attached to enforce the payment of a fine imposed upon a person found guilty of desertion for failing to perform military duty, the attachment expired by limitation. In this relation Mr. Bayard asked the lega-

tion to furnish, if practicable, an abstract of the limitation laws of Germany relating to attachments, fines, and other penalties for the nonperformance of military duty or desertion. The legation, in its No. 459, June 21, 1887, transmitted a report on the subject prepared by Mr. Coleman, secretary of legation. It was subsequently stated by the legation in its No. 484, July 28, 1887, that a repeated examination by Mr. Coleman of the German laws failed to show the existence of any provision by which the running of the statute was interrupted by absence beyond seas or other absence from Germany.

Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, May 21, 1887; Mr. Pendleton to Mr. Bayard, June 21, 1887, and July 28, 1887; For. Rel. 1887, 389, 392, 399.

Mr. Coleman's report reads as follows:

*"Abstract of limitation laws of Germany relating to fines, attachments to secure the same, and to other penalties for the nonperformance of military duty and for desertion."*

"I. Limitation for nonperformance of military duty (in the words of the German penal code '*violation of military duty*').

"The statute declares the offense to exist in the following three cases, assigning to each its penalty:

"(1) Where a person owing military duty, in order to avoid entering the standing army or navy, leaves the territory of the Empire without permission, or after having reached the age of military duty, remains without that territory without permission.

"The punishment for this offense is a fine of from 150 to 3,000 marks, or imprisonment of from one month to one year.

"(2) Where an officer, or a physician holding the rank of an officer of the reserve, the '*Landwehr*,' or '*Seewehr*,' emigrates without permission.

"The punishment for this offense is a fine not exceeding 3,000 marks, or arrest, or imprisonment not exceeding six months.

"(3) Where a person owing military duty emigrates after the publication of a decree by the Emperor, issued with reference to the existence of war, or to the danger of an outbreak of war.

"The punishment for this offense is imprisonment not exceeding two years and a fine not exceeding 3,000 marks.

"The property of the person charged with this offense may be attached, in so far as in the opinion of the judge such course is requisite to secure the amount of the highest fine which might be imposed, together with the cost of the proceedings.

"*When prosecution is barred by limitation.*—'*Violation of military duty*,' in the sense here under consideration, is denominated a *misdemeanor*, and prosecution for the same is *barred by limitation after five years*, at which time any *attachment* imposed on the property of the offender becomes *inoperative*.

"*Interruptions of the running of the statute.*—Every judicial measure adopted against the offender on account of the offense interrupts the running of the statute, which begins to run anew after the interruption. If the commencement or the continuation of a penal proceeding is dependent upon another question which must be first decided in another proceeding, the statute ceases to run until such decision is reached.

" *When execution of a judgment is barred.*—The execution of a judgment for violation of military duty is barred by limitation in five years.

" *Running of the statute and interruptions to same.*—The statute begins to run with the day on which the judgment becomes valid (*rechtskräftig*). Every act of the authority upon whom the execution of the judgment devolves which has for its aim such execution, as well as the arrest of the offender for the purpose of such execution, interrupts the running of the statute. After the interruption in the execution of the judgment the running of the statute begins anew.

" The execution of a fine adjudged concurrently with imprisonment is not barred by limitation earlier than the execution of the punishment of imprisonment is barred.

" II. *Limitation for desertion (Fahnenflucht).*

" The German military penal code (*Militär-Strafgesetzbuch*) declares that he who, without permission, quits the military or naval service for the purpose of permanently evading the performance of the service lawfully devolving upon him shall be regarded as guilty of desertion.

" *The penalty attached to the offense under varied circumstances.*—1. (a) The penalty for desertion is imprisonment of from six months to two years; (b) in the case of a second offense, imprisonment of from one to five years; (c) in the case of a further repetition, penal servitude (*Zuchthaus*) of from five to ten years.

" 2. (a) The penalty for desertion committed in the field is imprisonment of from five to ten years; (b) in the case of a second offense if the former desertion was not committed in the field, penal servitude of not less than five years; (c) and, if the desertion was committed in the field, death.

" 3. (a) The penalty of penal servitude or imprisonment incurred for desertion is, when committed by several persons together, upon an agreement to do so, increased by from one to five years; (b) in case the act was committed in the field, penal servitude, instead of imprisonment, for the same period; (c) and as against the ringleader and the person suggesting the offense, death.

" 4. (a) The penalty for the desertion of a sentry before the enemy or from a besieged fortress is death; (b) a deserter who goes over to the enemy also incurs the death penalty.

" (It is remarked in this connection that no fines are incurred by desertion.)

" *Definitions contained in the military penal code based upon the degree and character of the penalties incurred for desertion under the varied circumstances above stated.*—1. An act punishable by deprivation of liberty (not including penal servitude) of not more than five years is denominated a *military misdemeanor*.

" 2. An act punishable by death, penal servitude, or deprivation of liberty for more than five years is denominated a *military crime*.

" *When prosecution for desertion is barred.*—1. When the offense is a *military misdemeanor* as above defined, in five years.

" 2. When the offense is a *military crime* as above defined prosecution is barred as follows: (a) In twenty years, if the penalty is death or penal servitude for life; (b) in fifteen years, if deprivation of liberty for a longer period than ten years; (c) and in ten years, if deprivation of liberty for a shorter period.

" The running of the statute barring prosecution for desertion begins with the day on which the deserter, if he had not committed the act, would

have completed his lawful term of service, and is, as far as pertinent to the limitation of prosecution for desertion, subject to the same conditions as are hereinbefore stated under the head of limitation for violation of military duty.

"When execution of a judgment is barred.—The execution of a judgment for desertion is barred as follows:

- "1. In thirty years, if the penalty adjudged is death, penal servitude for life, or confinement in a fortress for life.
- "2. In twenty years, if penal servitude or confinement in a fortress for more than ten years.
- "3. In fifteen years, if penal servitude of not more than ten years, or confinement in a fortress of from five to ten years, or imprisonment of more than five years.
- "4. In ten years, if confinement in a fortress or imprisonment of from two to five years.
- "5. In five years, if confinement in a fortress or imprisonment of not more than two years.

"It is remarked in conclusion that the German military penal code, from which the foregoing abstract, as far as it relates to desertion, is taken, went into effect on October 1, 1872, and thereby superseded all other military penal provisions of law affecting material rights, leaving in force only certain forms of procedure existing in individual states of the Empire."

"Mr. [August] Junge was born at Celle, in the province of Hanover, May 28, 1867, and in 1887 he was taken as a recruit for the military service. He was permitted to go on leave till November 2, 1887, with orders to report for duty at that time. He did not obey, but emigrated to America to avoid the service. That he was a deserter is not denied or disputed. It has been so frequently and uniformly held that the treaty does not protect such deserters against trial and punishment on their return to Germany, although they have become naturalized as citizens of the United States, that I have not thought it advisable, though urged to do so, to intervene to claim immunity for him. It is, perhaps, quite unnecessary to make any reference to cases on this point; nevertheless I venture to cite Hans Jacobson's case (Foreign Relations, 1888, Vol. I., p. 586, Minister Pendleton, and p. 589, Secretary Bayard), in which, under similar circumstances, the action of the minister in declining to make application in the absence of instructions was approved."

Mr. Runyon, amb. to Germany, to Mr. Gresham, Sec. of State, Dec. 20, 1894, For. Rel. 1895, I. 530.

"Junge, born at Celle on May 28, 1867, was accepted in 1887 at Harburg by the main recruiting commission (Ersatz Kommission), and was ordered to report on November 1 of the same year. He did not appear, however, at the date fixed for him to report, and the investigations which were instituted showed that he had left for America. In consequence thereof he was, on September 24, 1887, by sentence of a military court, declared a deserter, and in *contumaciam* legally sentenced to pay a fine of 200 marks.

"On October 27 last Junge was arrested at Hamburg by order of the military authorities, and was tried by a military court. At the trial Junge acknowledged that he emigrated to America for the purpose of permanently escaping the fulfillment of his lawful duty of military service. His desertion had actually taken place before his emigration—when he left Hamburg in October, 1887—and as prosecution was not barred by limitation, article 2 of the treaty with the United States of America of February 22, 1868, is applied to him." (Baron Rotenhan to Mr. Runyon, Dec. 10, 1894, For. Rel. 1895, I. 532.)

"Mr. [Henry] Junge contends that the offense of desertion was not committed prior to his brother's departure from Germany, but consisted exclusively in the fact of his emigration. . . . The Department . . . was unable to accept the distinction made by Mr. Henry Junge." (Mr. Uhl, Acting Sec. of State, to Mr. Runyon, amb. to Germany, Feb. 26, 1895, For. Rel. 1895, I. 532.)

"In accordance with the direction of your instruction (No. 231) of February 26 last, I have made inquiry whether the statute of limitation was raised or passed upon at the trial of August Junge, and whether anything could be accomplished by now raising the point in behalf of the defendant, and I have the honor to report that I am credibly informed that that defense was not presented at the trial. It further appears that while in such cases as that of Mr. Junge (trial for desertion) the accused is permitted to defend himself, he is not allowed to have counsel for his defense. The limitation in the prosecution of the offense of desertion (*Fahrenflucht*) in such a case as that of Mr. Junge is five years, and the period of limitation begins from the time at which the deserter would have finished his term of military service had the offense not been committed, but the law provides that any action in the case on account of the offense committed taken by the judge against the absent defendant interrupts the running of the statute (*Preussische Gesetz-Sammlung*, vol. 5, pp. 29, 68): 'Jede Handlung des Richters, welche wegen der begangenen That gegen den Thäter gerichtet ist, unterbricht die Verjährung.'

"Whether such dealing (*Handlung*) with the case by the judge took place in the present instance I do not know. It is said, however, that the practice is to keep such claims alive—to prevent the barring by the statute—by some judicial act from time to time, looking to the punishment of the alleged offender. I may add that I do not see how it could be of any advantage to the accused in this case to raise the question of limitation diplomatically, he having had an opportunity of defending himself on the ground of limitation (if it existed) on his trial."

Mr. Runyon, amb. to Germany, to Mr. Gresham, Sec. of State, April 11, 1895, For. Rel. 1895, I. 533.



## 3. AUSTRO-HUNGARIAN TREATY.

## § 404.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"All male subjects of Austria-Hungary are liable to the performance of military service between the ages of nineteen and forty-two years.

"Under the terms of the treaty between the United States and Austria-Hungary a former subject of that country now a naturalized citizen of the United States is treated upon his return as a citizen of the United States. If he violated any of the criminal laws of Austria-Hungary before the date of emigration he remains liable to trial and punishment, unless the right to punish has been lost by lapse of time as provided by law. A naturalized American citizen formerly a subject of Austria-Hungary may be arrested and punished under the military laws only in the following cases: (1) If he was accepted and enrolled as a recruit in the army before the date of emigration, although he had not been put in service; (2) if he was a soldier when he emigrated, either in active service or on leave of absence; (3) if he was summoned by notice or by proclamation before his emigration to serve in the reserve or militia, and failed to obey the call; (4) if he emigrated after war had broken out.

"A naturalized American citizen of Austro-Hungarian origin on arriving in that country should at once show his passport to the proper authorities; and if, on inquiry, it is found that his name is on the military rolls, he should request it to be struck off, calling attention to the treaty of September 20, 1870, between this country and Austria-Hungary."

Circular notice, Department of State, Washington, Feb. 1, 1901, For. Rel. 1901, 7.

Mr. Hay, Secretary of State, in an instruction to Mr. Herdliska, chargé at Vienna, December 10, 1900, stated that the Department, in view of the complaints by naturalized citizens who had received passports that they were not informed of the limits of the protection which they would afford, had determined to pursue a new system, by which no American citizen of foreign birth should receive a passport without being acquainted with the pertinent provisions of the law of the land of his birth. (For. Rel. 1901, 7.)

"Naturalization is regarded as a purely domestic act, whereof all the conditions are controlled by the law of the naturalizing country; and while in the interest of reciprocal good feeling the United States has been willing to stipulate by treaty that under certain circumstances the act of naturalization here should not protect an Austrian

naturalized in the United States and voluntarily returning to the Empire, from the consequences of violating military law, we cannot admit that any relation in which an alien may stand towards his own Government should be a bar to naturalization as an American citizen, if the applicant be within the jurisdiction of the United States and comply with all the requirements of the statute.

"Sections 1, 2, and 3 of Article II. of the treaty aim to except from protection by naturalization, in case the naturalized person return to his former country, all cases where the offense of evading military duty shall be completed by some intentional act of the offender, committed while yet within Austrian jurisdiction. The hypothetical case presented does not seem to come within this broad principle."

Mr. Frelinghuysen, Sec. of State, to Mr. Taft, Aug. 25, 1883, MS. Inst. Austria, III. 252.

In the case of Frank Xavier Fisher, a naturalized citizen of Austrian origin, who was arrested and imprisoned in Austria for non-performance of military duty, the Department of State said that if Mr. Fisher, as he alleged, emigrated before he had been conscripted, he was exempt under the treaty of September 20, 1870, from prosecution for nonfulfillment of military duty.

For. Rel. 1889, 25-27, 35-36.

In the case of Ladislao Sedivy, a naturalized citizen of the United States, born in Bohemia, it was held, in accordance with the third proviso of the second paragraph of Article II. of the convention between the United States and Austria of September 20, 1870, that a member of the Austrian reserve corps, who, at the time of his emigration, had not been called into active service, was not subject to trial for violation of the Austrian military law.

The same thing was held by the Austrian Government in the case of Franz Holasek, in which it was held that a person who, as a member of the reserve corps, remained liable to be called at any time into active service, was not guilty of desertion if he emigrated to and became a citizen of the United States if he had not been actually summoned for duty.

For. Rel. 1896, 6-13, 16-18.

S. A., born in Bohemia, Aug. 8, 1871, obtained in 1891, before he had been enrolled for military duty, a permit to travel, and went to America, where he was naturalized Dec. 4, 1896. Meanwhile, he was adjudged by the K. K. Kreisels Strafgericht, in Leitmeritz, to have evaded military duty, and his name was entered on the military lists as a deserter. The United States legation at Vienna presented the case to the Austrian Government, submitting a copy of A.'s cer-

tificate of naturalization, and requesting that, if the facts should be found to be as stated, his name might be removed from the list of deserters, so that he might enjoy within the Empire the privileges of an American citizen. The Austrian Government replied that, his legal naturalization having been fully established, the necessary steps had been taken to terminate the proceedings for evasion of military duty and to have his name dropped from the military lists, in conformity with the treaty of Sept. 20, 1870.

For. Rel. 1898, 10-15.

Referring to the case of Peter Hornik, a naturalized citizen of the United States, of Hungarian origin, who was said to have been notified by the Austro-Hungarian authorities, on his return to his native country, to appear for military service, the United States legation at Vienna reported: "It would seem that Mr. Hornik was in no way detained or molested contrary to his rights as an American citizen, but that the summons sent to him was merely the usual demand made in this country of all returning emigrants to prove their freedom from liability to perform military service. This demand was met satisfactorily in the case of Mr. Hornik by the exhibition of his naturalization certificate, which established his American citizenship."

Mr. Tower, min. to Austria-Hungary, to Mr. Sherman, Sec. of State, Feb. 11, 1898, For. Rel. 1898, 15, 16. See, also, the case of Herman Meller, reported in Mr. Tower, min. to Austria-Hungary, to Mr. Day, Sec. of State, July 1, 1898, For. Rel. 1898, 23-29.

"The questions raised in this case appear to be pretty thoroughly covered by the case of Ladislao Sedivy, the correspondence concerning which is printed in Foreign Relations for 1896, pages 6 et seq., which was made a test case by your predecessor, Mr. Tripp. The position taken by Mr. Tripp was that a returning American citizen of Austro-Hungarian birth can not be punished for a crime committed by act of emigration *but only for an offense committed before emigration*, and that *in all cases when the member of the reserve corps emigrated before receiving a call into active service he was guilty of no crime against the military laws of Austria-Hungary and was not subject to arrest upon his return nor to punishment as a deserter.* This position was conceded by the Austrian authorities."

Mr. Hay, Sec. of State, to Mr. Harris, min. to Austria-Hungary, May 10, 1900, For. Rel. 1900, 30, 31.

"On several previous occasions the attention of Congress has been directed to the questions arising with Austria-Hungary growing out of arrests of returning naturalized citizens on the ground of unfulfilled military service accruing before they acquired our nationality. The progress steadily made toward their settlement has been most

satisfactory, and the published correspondence will show the disposal of a residual issue touching the treaty exemption of such citizens from liability for constructive offence in the act of emigration itself, while the understanding of the two Governments as to the class and scope of punishable acts committed by such persons prior to emigration has become more precise. In consequence, arrests on this score have become infrequent in Austria-Hungary, and release promptly follows the representations of our agents in all worthy cases." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxiii.)

#### 4. BELGIAN TREATY.

##### § 405.

"The information given below is believed to be correct, yet it is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Every male Belgian must register during the calendar year in which he reaches the age of 19 years to take part in the drawing of lots for the raising of the necessary military contingent.

"Anyone who has drawn a number which designates him for military service, or in case of his absence has had a number drawn for him by the proper authority, is punishable if he does not answer the call for service.

"Under the terms of the convention between the United States and Belgium a Belgian naturalized as a citizen of the United States is considered by Belgium as a citizen of the United States; but upon return to Belgium he may be prosecuted for crime or misdemeanor committed before naturalization, saving such limitations as are established by the laws of Belgium.

"A naturalized American formerly a Belgian, who has resided five years in this country, can not be held to military service in Belgium or to incidental obligation resulting therefrom, in the event of his return, except in cases of desertion from organized or embodied military or naval service."

Circular Notice, Department of State, Feb. 5, 1901, For. Rel. 1901, 16.

#### 5. DANISH TREATY.

##### § 406.

"The information given below is believed to be correct, yet it is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Military service becomes compulsory to a subject of Denmark during the calendar year in which he reaches the age of 22 years.

"In November or December of the year in which he becomes 17 years old he is expected to report for enrollment on the conscrip-

tion lists. If he neglects to do so he may be fined from 2 to 40 kroner; but if his neglect arises from a design to evade service he may be imprisoned.

"In case he fails to appear when the law requires that he be assigned to military duty he is liable to imprisonment.

"When one whose name has been or should have been entered on the conscription lists emigrates without reporting his intended departure to the local authorities he is liable to a fine of from 25 to 100 kroner.

"A person above the age of 22 years entered for military service must obtain a permit from the minister of justice to emigrate. Non-compliance with this regulation is punishable by a fine of from 20 to 200 kroner.

"The treaty of naturalization between the United States and Denmark provides that a former subject of Denmark naturalized in the United States shall, upon his return to Denmark, be treated as a citizen of the United States; but he is not thereby exempted from penalties for offenses committed against Danish law before his emigration. If he renews his residence in Denmark with intent to remain, he is held to have renounced his American citizenship.

"A naturalized American, formerly a Danish subject, is not liable to perform military service on his return to Denmark, unless at the time of emigration he was in the army and deserted, or, being 22 years old at least, had been enrolled for duty and notified to report and failed to do so. He is not liable for service which he was not actually called upon to perform."

Circular Notice, Department of State, April 10, 1901, For. Rel. 1901, 139-140.

See Mr. Day, Assist. Sec. of State, to Mr. Haskell, Nov. 13, 1897, 222 MS. Dom. Let. 371; Mr. Swenson, min. to Denmark, to Mr. Jensen, Feb. 18, 1901, For. Rel. 1901, 135.

S. was born in Denmark in 1860. At the age of 17 he emigrated to the United States, after having notified the proper authorities as required. His name was not, however, stricken from the military rolls. He was naturalized in the United States in 1895, and in 1897 returned to Denmark, where he purchased a piece of property which he exchanged in the following year for another piece of property. In September, 1899, he went back to the United States for the purpose, as it was alleged, of selling some property which he owned there. In September, 1900, he again returned to Denmark, where he was summoned to perform military duty. The Danish Government maintained that, as he had been "domiciled in Denmark more than two years," had become a "proprietor," and had made his living there, "both as agriculturist and as keeper of a temperance hotel,"

his summons to do military duty was in conformity with article 3 of the treaty of July 20, 1872. It was held by the Government of the United States that the facts recited "would seem to throw upon Mr. Sörensen the onus of showing that his acts, as recited in the note, do not evince an intention on his part to acquire a permanent domicil in Jutland."

Mr. Hay, Sec. of State, to Mr. Swenson, min. to Denmark, April 12, 1901,  
For. Rel. 1901, 136-139.

N. was born in Denmark, January 21, 1867. In September, 1886, he appeared for examination for military duty and was assigned to duty in the infantry. He then went to America. He stated that before doing so he wrote to the minister of war for leave, but he had not received it when he departed. He thus appeared to have violated the military law and to be liable to punishment as a deserter; but it seems that "in other cases of a similar character, when the returning visitor produced a passport from the United States, showing him to be a citizen of that country, the Danish Government refrained from exacting military duty or inflicting punishment for desertion."

Mr. Risley, min. to Denmark, to Mr. Sherman, Sec. of State, Oct. 14, 1897,  
For. Rel. 1897, 120.

#### 6. TREATY WITH SWEDEN AND NORWAY.

#### § 407.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Subjects of Sweden are liable to performance of military duty in and after the calendar year in which they reach their twenty-first year.

"Under the treaty between the United States and Sweden and Norway, a naturalized citizen of the United States, formerly a subject of Sweden, is recognized as an American citizen upon his return to the country of his origin. He is liable, however, to punishment for an offense against the laws of Sweden committed before his emigration, saving always the limitations and remissions established by those laws. Emigration itself is not an offense, but nonfulfillment of military duty and desertion from a military force or ship are offenses.

"A naturalized American who performed his military service or emigrated when he was not liable to it, and who infringed no laws before emigrating, may safely return to Sweden,

"If he renews his residence in the Kingdom without intent to return to America, he is held to have renounced his American citizenship, and he will be liable to perform military duty."

Circular Notice, Department of State, Washington, Feb. 9, 1901, For. Rel. 1901, 486.

A similar notice was issued with regard to Norway, with the following exceptions:

"Subjects of Norway are liable to performance of military duty in and after the calendar year in which they reach their twenty-second year. . . .

"He [a naturalized American citizen returning to Norway] must, however, report to the conscription officers, and, on receiving a summons, present himself at the meetings of the conscripts in order to prove his American citizenship.

"If he has remained as long as two years in Norway, he is obliged, without being summoned, to present himself for enrollment at the first session, since he is then deemed by Norway to have renounced his American citizenship.

"If he renews his residence in the Kingdom without intent to return to America, he is held to have renounced his American citizenship."

A naturalized citizen of the United States of Norwegian origin, having been arrested and held for military service on his return to his native country, sought to make a claim for compensation. It appearing that his arrest and detention were due to "resistance to, and delay in complying with, the reasonable requirement to prove his American citizenship before the competent authority," it was held that the case did not present a proper ground for intervention.

Mr. Hay, Sec. of State, to Mr. Thomas, min. to Sweden and Norway, Jan. 16, 1902, For. Rel. 1901, 494.

## VII. NATIONALITY OF MARRIED WOMEN.

### 1. MARRIAGE OF AMERICAN WOMEN TO ALIENS.

#### (1) EFFECT ON STATUS.

#### § 408.

A woman who was born in South Carolina and resided with her father, a citizen of that State, in Charleston, at the time of the Declaration of Independence and afterwards, till 1781, when she was married to a British officer, with whom she went to England in 1872, where she remained till her death in 1801, was held to be an alien. The opinion of the court was not that she ceased to be a citizen simply by her marriage to an alien, but that her withdrawal with her husband, and her permanent adherence to the side of the enemies of the State down to and at the time of the treaty of peace (1783), operated

as a virtual dissolution of her allegiance by an election which her coverture did not prevent her from making.

*Shanks v. Dupont*, 3 Pet. 242.

It has been held that an American woman who marries an alien in the United States, and lives there with him till his death, is not an alien. (*Comitis v. Parkerson*, 56 Fed. Rep. 556. *Contra*, *Pequignot v. Detroit*, 16 Fed. Rep. 211.)

A native American woman was married in the United States in 1828 to a Spanish subject. Three years later **Case of Mrs. Preto.** she removed with her husband to Spain, taking with her an infant daughter, who also was American born. The family was still residing in Spain when, in 1858, the husband died. The American legation at Madrid subsequently raised the question whether the widow and her daughter might be regarded as citizens of the United States. Attorney-General Bates, to whom the question was referred, advised (1) that the lady did not, by marrying a Spanish subject in the United States, lose her American citizenship; (2) that the daughter born in the United States was an American citizen by birth; (3) that their removal to Spain and residence in that country constituted, under the circumstances, no evidence of an attempt on their part to cast off their native allegiance and adopt a new sovereign; and (4) that they both were American citizens.

*Bates*, At.-Gen., Aug. 6, 1862, 10 Op. 321; *case of Mrs. Preto, née Griffith*, and her daughter. See, however, *Kircher v. Murray*, 54 Fed. Rep. 617.

By section 116, of the internal-revenue act of 1864, 13 Stat. 281, "citizens of the United States residing abroad" were

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my's Case.**

subject to an income tax. A question arose as to whether this phrase applied to Madame Berthemmy. Her father was a citizen of the United States, but she was born in France and married there a French subject, and after his death she continued to live in France, where, as it was stated, she had always been domiciled. Attorney-General Stanbery, to whom the case was referred, observed that the act of February 10, 1855, had the effect of naturalizing all persons born abroad before its passage whose fathers were, at the time of their birth, citizens of the United States. Had Madame Berthemmy acquired the rights of a French subject? In this relation, the Attorney-General observed that by the French Civil Code, Book I., chap. 1, art. 9, a person born in France of foreign parents acquired the quality of a Frenchman, not by the mere fact of birth on French soil, but only on complying with certain conditions during the year following the attainment of majority; but that, as it did not appear whether Madame Berthemmy acquired French citizenship



under this provision, the question of her national character depended upon the effect of her French marriage. In this relation, the French Civil Code, said the Attorney-General, provided (Book I., chap. '1, art. 12) that a foreign woman who married a Frenchman should follow the condition of her husband. Madame Berthemy therefore had a good title by marriage to citizenship of France, and was to be treated as a French citizen, and not as a citizen of the United States.

Stanbery, At.-Gen., Aug. 13, 1866, 12 Op. '7.

The Attorney-General remarked that a provision similar to that in the French code, respecting the marriage of alien women with Frenchmen, was contained in the statute of 1855, which was substantially like the English statute of 7 & 8 Vict. sec. 16. He also remarked that it was unnecessary to advert to the question whether a person, formerly a citizen of the United States, who had acquired a new nationality abroad, might by domiciliary residence in the United States become reinvested with the quality of an American citizen, since there was nothing to show that Madame Berthemy had in that way exhibited a desire and intention to assume the duties and obligations of an American citizen.

By section 13 of the internal-revenue act of 1867, 14 Stat. 477, amending section 116 of the act of 1864, citizens of the United States residing abroad continued to be subject to an income tax. In September, 1868, the Secretary of the Treasury submitted to Attorney-General Hoar the question whether an "American woman born in the United States, residing in France, and married there to a citizen of France, is, by reason of such marriage, to be regarded as having lost her American citizenship." The Attorney-General held that the opinion given in the case of Madame Berthemy was "directly in point," since it decided "that a woman, a citizen of the United States, domiciled in France and marrying there a citizen of France," was not a citizen of the United States within the meaning of the words in the revenue act. The Attorney-General added that he did not propose to express any opinion "whether a woman who is by birth a citizen of the United States, and by marriage has become a citizen of France, is not after such a marriage a citizen of the United States in a qualified sense." In view of the fact that the laws of the United States had, as he said, "adopted the policy of permitting women to acquire citizenship by marriage," he preferred to adhere to the conclusion reached by Mr. Stanbery.

Hoar, At.-Gen., July 12, 1869, 13 Op. 128.

Mr. Fish, February 24, 1871, after observing that by the law of England and the United States an alien woman, on her marriage with a subject or citizen, merged her nationality in that of her husband, said: "But the converse has never been established as the law of the United States,

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and only by the act of Parliament of May 12, 1870, did it become British law that an English woman lost her quality of a British subject by marrying an alien. The Continental codes, on the other hand, enable a woman whose nationality of origin has been changed by marriage to resume it when she becomes a widow, on the condition, however, of her returning to the country of her origin. The widow to whom you refer may, as a matter of strict law, remain a citizen, but as a citizen has no absolute right to a passport, and as the law of the United States has outside of their jurisdiction only such force as foreign nations may choose to accord it in their own territory, I think it judicious to withhold passports in such cases unless the widow gives evidence of her intention to resume her residence in the United States."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, No. 238, Feb. 24, 1871.

Cited with approval in Mr. Bayard, Sec. of State, to Mr. Hall, min. to Central America, Jan. 6, 1887, For. Rel. 1887, 92. Mr. Bayard said: "I am not disposed to depart from this precedent which may be readily reconciled with the opinion of Attorneys-General Bates (10 Op. 321), Stanbery (12 Op. 7), and Hoar (13 Op. 128)."

The case before Mr. Bayard was as follows: A native American woman was married in Jamaica in 1869 to a Spanish subject. They subsequently removed to Chile, where her two children, who were still minors, were born. In 1879 the family went to Salvador, where the husband died in 1883. At the time of his death he had a claim against the Government of Salvador, which his widow afterwards endeavored to prosecute through the Spanish legation, but without success. She then invoked the aid of the legation of the United States, on the ground that, when her husband died, her original citizenship reverted. Mr. Hall, the American minister in Central America, in reporting the case, observed that it differed from that decided by Attorney-General Bates, *supra*, in that the marriage was not performed in the United States; and he had therefore informed the lady that she and her children followed the nationality of her husband. Mr. Bayard said: "Under these circumstances I must hold that Mrs. Arana as long as she remains without the jurisdiction of this Government is not entitled to the privileges of a citizen of the United States, so far at least as would entitle her to diplomatic interposition on her behalf against the Government of Salvador on a claim accruing since her marriage and departure from the United States." (For. Rel. 1887, 92.)

"Although the marriage of a female citizen of the United States with a foreigner should make her a citizen of the country to which her husband belongs, it does not necessarily follow (as was said in my instruction No. 238 to Mr. Washburne, referred to in your dispatch) that she becomes subject to all the disabilities of alienage, such for instance, as inability to inherit or to transfer real property. In approving of Mr. Washburne's refusal to grant a passport in the case then under consideration, I intended not to be held, by inference, to an opinion beyond what I expressed, or upon questions not necessary

to a decision of the case presented." (Mr. Fish, Sec. of State, to Mr. Williamson, Sept. 22, 1875, MS. Inst. Costa Rica, XVII. 266.)

"I have to inform you of the receipt of your despatch of the 11th instant, No. 25, submitting for instructions the question whether the widows of Spanish subjects, who, previous to their marriage, were citizens of the United States, are entitled to be registered as such in the consulate-general and to receive the protection accorded to such citizens.

"In reply I have to say that the law touching the status of a female citizen of the United States who marries a Spanish subject was examined at length in dispatch No. 70, of November 24, 1869, addressed to Mr. Plumb, then consul-general, and to which you are referred as representing the views now held by this Government. In the closing paragraph of that dispatch, and in review of its previous statements, the Assistant Secretary says: 'The American female citizen, when within the United States, must, in virtue of statutes operative within that jurisdiction and not elsewhere, be deemed a citizen although, by marrying a foreign subject, she had, while under the dominion of the foreign law, made herself for all purposes a subject of the country to which her husband owed allegiance. But, while remaining in the foreign country, we can only regard her as having voluntarily exercised the right of expatriation for which the executive and legislative departments of our Government have strenuously contended, and which was sanctioned by the law of her actual domicile.'

"In the light of the decision above given, and as affording a reply to your inquiry, it is apprehended that, so long as the widow of a Spanish subject shall remain in the Spanish territory after the death of her husband, she continues in the relation to its Government that was contracted by her marriage; and if she shall return to such territory, after an absence in the United States, with the intention of still maintaining her domicile there, that relation is conceived still to remain, even though she may have provided herself with a passport by virtue of her birth in the United States.

"In case, however, she shall have fixed her residence in the United States since the death of her husband and shall return within Spanish jurisdiction, without the intention to abandon that residence or to remain longer than the objects of a temporary sojourn may require, she is not deemed to lose thereby the right to the protection which she has acquired by resuming her previous relations to the Government of the United States. In such case no sufficient objection appears to her being registered as a citizen in the consulate-general."

Mr. Hunter, Second Assist. Sec. of State, to Gen. Torbert, consul-general at Havana, No. 25, Jan. 31, 1872, 64 MS. Desp. to Consuls, 20.

A woman, originally a citizen of the United States, who stated that she was married to a Mexican citizen, domiciled in Mexico, complained to the Government of the United States of wrongs resulting from her husband's desertion and neglect. The Department of State replied that, under the circumstances, and so far as regarded the rights which she had acquired under her marriage contract, she had by her marriage become, in contemplation of Mexican law, a citizen of that Republic; and that all questions concerning the assertion of such rights were therefore governed by the laws of that country, with the administration of which laws it was not the province of the United States to interfere.

Mr. Fish, Sec. of State, to Mrs. Negrete, Oct. 28, 1874, 105 MS. Dom. Let. 17; Mr. Fish, Sec. of State, to Mrs. Wallace, Oct. 28, 1874, *id.* 25.

That a woman partakes of her husband's nationality, see, also, Mr. Fish, Sec. of State, to Mr. Perez, March 18, 1870, MS. Notes to Nicaragua, II. 13.

While, by the law of the United States, an alien woman on her marriage with a citizen merges her nationality in that of her husband, it never has been "incontrovertibly established" as the law of the United States that an American woman by marriage with an alien loses the quality of an American citizen.

Mr. Fish, Sec. of State, to Mr. Rublee, No. 210, April 11, 1876, MS. Inst. Switzerland, I. 382.

"As the statutes of the United States make no provision for the expatriation of a female citizen" by her "marriage with an alien, it is possible that it may be held that" a woman in such a position "has a double nationality, so far at least as rights of property may be affected. On this point I can express no opinion."

Mr. Frelinghuysen, Sec. of State, to Count Lewenhaupt, Swedish min. April 10, 1882, MS. Notes to Sw. & Nor. VII. 236. See *infra*, p. 455.

An American woman, married to a British subject, who had a "commercial domicile" in Mexico, complained of injuries to his property, in which she claimed an interest. It was held that, as "a woman who marries a foreigner takes by that act the nationality of her husband," and as the property was in Mexico, under the control of the husband, who, although he afterwards became a citizen of the United States, was, at the time when the injuries were inflicted, "an alien and not entitled to the protection of the United States," there was no ground for intervention.

Mr. Frelinghuysen, Sec. of State, to Mrs. Walsh, Jan. 31, 1884, 149 MS. Dom. Let. 541.

That a wife's political status follows that of her husband, see Mr. Frelinghuysen, Sec. of State, to Mr. Lawrence, March 31, 1883, 146 MS. Dom. Let. 287; to Mr. Foster, April 2, 1883, 146 MS. Dom. Let. 311.

"The view has been taken by this Department in several cases that the marriage of an American woman to a foreigner does not completely divest her of her original nationality. Her citizenship is held for most purposes to be in abeyance during coverture, but to be susceptible of revival by her return to the jurisdiction and allegiance of the United States."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, Feb. 1, 1890, For. Rel. 1890, 301.

See, to the same effect, Mr. Evarts, Sec. of State, to Mrs. Wood, Sept. 24, 1880, 134 MS. Dom. Let. 455.

An application was made to the Department of State for a passport for an American woman, who, though married to a British subject, desired, it was said, to retain her American citizenship and to reside in New York. The Department declined to grant the application, on the ground that, under British law and the naturalization treaty between the United States and Great Britain of May 13, 1870, the woman in question was a British subject. It was added, however, that this decision did not imply any opinion as to her status, "so far as her property and local rights may be concerned, under the law of the State of her residence. That is a question determinable by a court having appropriate jurisdiction."

Mr. Day, Assist. Sec. of State, to Mr. Robertson, Oct. 21, 1897, 221 MS. Dom. Let. 584.

It is the practice of the Department of State to decline to issue passports to the American-born wives of foreigners who continue to reside in the United States after marriage. (Mr. Adee, Second Assist. Sec. of State, to Mr. Wildman, consul at Hongkong, No. 30, March 24, 1898, 161 MS. Inst. Consuls, 7.)

A person who inquired "whether the British Government would recognize the naturalization papers of a former British subject, an English woman, who was naturalized in the United States without the consent of her husband," was advised to consult private counsel learned in the law of Great Britain. (Mr. Adee, Acting Sec. of State, to Mrs. Clark, Oct. 3, 1896, 213 MS. Dom. Let. 77.)

## (2) REVERSION OF NATIONALITY.

### § 409.

An application for the interposition of the United States was made by a woman who represented that she was an American citizen by birth and the widow of a Turkish subject. The application was dated at Constantinople, and its tenor indicated that the applicant's

"marital domicile was in Turkey." Supposing this to be the case, the Department of State had "no hesitation in saying" that, so long as she remained in Turkey, she could not, unless for the purpose of enabling her to return to the United States, obtain the Department's interposition. By marrying a Turkish subject and taking up her residence in Turkey, she became, said the Department, a Turkish subject, and to recover her American nationality "must leave Turkey and take up an American residence."

Mr. Bayard, Sec. of State, to Mrs. Lografo, Feb. 6, 1886, 158 MS. Dom. Let. 694.

The fact that an American-born woman married to a Chinese subject is residing in a country in which the United States has extraterritoriality does not afford her any basis for asserting her American citizenship. (Mr. Adey, Second Assist. Sec. of State, to Mr. Wildman, No. 30, March 24, 1898, 161 MS. Inst. to Consuls, 7.)

A quotation has been made from a note of Mr. Frelinghuysen to the minister of Sweden and Norway (*supra*, p. 453). The woman therein referred to was afterwards divorced from her husband, a Swede, by the Swedish courts, on account of her insanity, and was placed by her mother, an American citizen, by whom she was supported, in an asylum in Austria. From this asylum she was in 1888, against the protest of her mother, removed by a person acting as her guardian under Swedish law to an asylum in Sweden. Her mother sought to regain her custody, as her "only rightful and natural guardian;" and to this end resorted to the Swedish courts, and also invoked the good offices of the United States. The Department of State gave the following instructions: "As Madam de B—— was divorced from her husband upon his application it is thought that such good offices can properly be employed in her behalf as a person whose original American nationality has reverted to her."

Mr. Bayard, Sec. of State, to Mr. Magee, min. to Sw. & Norway, No. 127, Feb. 15, 1889, MS. Inst. Sw. & Nor. XV. 196. See, also, Mr. Bayard, Sec. of State, to Mr. Magee, tel., Feb. 23, 1889, *id.* 199.

See, however, *Pequignot v. Detroit*, 16 Fed. Rep. 211.

An American woman was married to a Russian subject. Four years after his death, while she was residing in France, the intervention of the United States in her behalf was invoked in respect of proceedings which, it was alleged, were about to be instituted to commit her to an insane asylum. As it did not appear that she had exercised her "possible right" of reversion to her original citizenship, which, if it existed, could be effectively asserted "by returning to and dwelling in the country of her maiden allegiance," it was held that the United States could not officially intervene in her behalf.

Mr. Day, Assist. Sec. of State, to Mr. Updegraff, Jan. 27, 1898, 225 MS. Dom. Let. 24.

By a joint resolution approved May 18, 1898, reciting that Nellie Grant Sartoris, widow, daughter of Gen. U. S. Grant, and a natural-born citizen of the United States, had married in 1874 a British subject, thereby becoming, under the laws of Great Britain, a naturalized British subject, recognized as such by the United States under the naturalization convention of May 13, 1870, it was declared that Mrs. Sartoris was, "on her own application, unconditionally readmitted to the character and privileges of a citizen of the United States," in accordance with Art. III. of that convention.

30 Stat. 1496.

A woman, a citizen of the United States, was married to a Dutch subject, from whom she was subsequently divorced. After the divorce she resumed her domicile in the United States. It was held that she was entitled to a passport as an American citizen.

Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switzerland, No. 160, March 16, 1899, MS. Inst. Switz. III. 206.

## 2. MARRIAGE OF ALIEN WOMEN TO AMERICANS.

### (1) AMERICAN LAW.

#### § 410.

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Rev. Stat., § 1904; act of Feb. 10, 1855, chap. 71, § 2, 10 Stat. 604; *Walker v. Potomac Ferry Co.*, 3 McArthur, 440; *Belcher v. Farren*, 89 Cal. 73; *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303; *Leonard v. Grant*, 6 Sawyer C. C. 603.

As to the law prior to the act of 1855, see *Shanks v. Dupont*, 3 Pet. 242; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *White v. White*, 2 Met. (Ky.) 185.

The act applies to a woman married to an alien who subsequently becomes naturalized. (*Kelly v. Owen*, 7 Wall. 496; *Headman v. Rose*, 63 Ga. 458; *Burton v. Burton*, 1 Keyes, 359.)

The phrase, "might herself be lawfully naturalized," refers to class or race, and not to the qualifications of character, residence, etc. (*Leonard v. Grant*, 6 Sawyer C. C. 603; *Kelly v. Owen*, 7 Wall. 496. See *Burton v. Burton*, 1 Keyes, 359; *Pequignot v. Detroit*, 16 Fed. Rep. 211, 215.) Since the act of July 14, 1870, rendering persons of the African race capable of naturalization, women of African blood have been within the operation of the statute. (*Broadbts v. Broadbts*, 86 Fed. Rep. 951.)

The statute applies to a woman married to a citizen of the United States, irrespective of the time or place of marriage or the residence of the parties (*Kelly v. Owen*, 7 Wall. 496; *United States v. Kellar*, 11 Biss. 314; *Williams, At.-Gen.*, 1874, 14 Op. 402); even though the woman

lived at a distance from her husband and never came to the United States till after his death. (*Kane v. McCarthy*, 63 N. C. 299; *Headman v. Rose*, 63 Ga. 458. See *Burton v. Burton*, 1 Keyes, 359, 362, 366; *Pequignot v. Detroit*, 16 Fed. Rep. 211, 215.) But it has been held that a native woman who married an alien in the United States, and lived with him there till his death, did not conversely become an alien. (*Comitis v. Parkerson*, 56 Fed. Rep. 556.) In an earlier case, however, it was held that a woman, an alien by birth, who lived in the United States, and who, after the death of her husband, a citizen of the United States, married a subject of her native country, resumed her original nationality. (*Pequignot v. Detroit*, 16 Fed. Rep. 211. *Contra*, *Phillips*, Solc. General. 1877, 15 Op. 599.)

That a divorced woman continues to be a subject of the state of which her husband was a subject, still she, by some act, changes her nationality, seems to be tacitly assumed in *Pequignot v. Detroit*, 16 Fed. Rep. 211.

“Inasmuch as the subject of naturalization is within the exclusive jurisdiction of Congress, there would seem to be little question that such a marriage [one in conformity with the act of June 22, 1860] would be effectual for the purpose of naturalizing an alien female married to a citizen of the United States.”

Mr. Fish, Sec. of State, to Mr. Bancroft, June 7, 1870, MS. Inst. Prussia, XV. 126.

Under the act of February 10, 1855, an alien woman, upon her marriage to an American citizen, acquires the right to be regarded by the authorities of the United States as an American citizen “in every country except that to which she owed allegiance at the time of her marriage.” It may be, however, that by the law of such country she is regarded as becoming by her marriage a foreigner. In such case no conflict of law could arise, since the government of her original allegiance would concede her full American citizenship.

Mr. Fish, Sec. of State, to Mr. Jewell, min. to Russia; June 9, 1874, H. Ex. Doc. 470, 51 Cong. 1 sess. 24, quoted *infra*, § 412.

Where a woman, a native of Santo Domingo, who had been married to a consul of the United States in that country, but who, after his death, continued to reside there, invoked the interposition of the United States in respect of depredations on her property, which were alleged to have been permitted by the authorities of the island, it was held that, while the United States “does regard the naturalization of a foreigner by reason of her marriage to an American citizen to be valid, yet at the same time something more than a mere marriage solemnization is required to establish good citizenship, such, for instance, as a domicile of some considerable duration in this country;” and that, as the complainant was a native of Santo Domingo, was married there, and had lived there since her husband’s death, and as her



property interests seemed to be "centered in that quarter," and the evils of which she complained appeared to be "of a purely judicial nature," it was not thought that it would be "either efficacious or proper" to interfere in the matter.

Mr. Evarts, Sec. of State, to Mrs. Marced de la Rodia, June 21, 1879, 128 MS. Dom. Let. 545.

It was suggested, but not decided, on a passport application, that the same principle might apply to the case of the foreign-born widow of an American citizen, who, after her husband's death, resided in a third country, and who had never lived in the United States. The passport was, however, refused on another ground, namely, that the husband, who was a naturalized citizen of the United States, had before his death abandoned his American for a European domicile. (Mr. Sherman, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 379, March 15, 1897, MS. Inst. Russia, XVII. 551.)

The Government of the United States can not recognize the right of the original Government of an alien-born woman, who was married to a naturalized citizen of the United States, but who has been divorced from him, to intervene in her behalf, so long as she voluntarily continues to make the United States her home. (Mr. Adee, Second Asst. Sec. of State, to Mr. Knagenhjelm, Aug. 21, 1895, MS. Notes to Sw. & Norway, VII. 591.)

The American minister at Peking having instructed the American vice-consul at Hankow that Chinese and Japanese women, married to citizens of the United States, form an exception to the rule that the citizenship of the husband determines that of the wife, on the ground that Chinese and Japanese are not capable of naturalization in the United States and that women of those races therefore do not fall within sec. 1994 R. S., his views were approved.

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 622, Feb. 5, 1903, For. Rel. 1903, 45, citing *Kelly v. Owen*, 7 Wall. 496, and *Burton v. Burton*, 40 N. Y. 373.

See Mr. Conger to Mr. Cameron, Dec. 11, 1902, For. Rel. 1903, 44, citing 5 Sawyer, 155; 6 Sawyer, 541; *Fong Yue Ting v. United States*, 149 U. S. 716; *In re Gee Hop*, 71 Fed. Rep. 274.

## (2) REVERSION OF NATIONALITY.

### § 411.

J., the widow of an American citizen, residing in Nicaragua, claimed exemption, on the ground of her American citizenship, from a forced loan. She was a native of Nicaragua. Held, that while she acquired by her marriage the nationality of her husband by virtue of section 1994, Revised Statutes, yet, being a native of Nicaragua and continuing to reside in the country of her origin, there was room for the contention that she had resumed her original nationality; and that, as she had not since her husband's death manifested any

intention of coming to the United States, it was not the duty of the Government to intervene to secure her immunity from obligations imposed upon her by the country of her birth and continued domicil.

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, Jan. 24, 1894, For. Rel. 1894, 460.

"I have received your letter of October 21st, complaining of a law recently promulgated in Nicaragua, by virtue of which a native Nicaraguan woman, who, having married an alien, continues to reside in Nicaragua after his death, recovers her Nicaraguan nationality.

"As the courts of the United States have decided that an American-born woman who marries a foreigner and subsequently becomes a widow, still residing here, remains a citizen of the United States, we can not object to Nicaragua declaring by law a similar rule in respect to a native of Nicaragua."

Mr. Uhl, Act. Sec. of State, to Mr. Flint, Dec. 11, 1894, 199 MS. Dom. Let. 634.

This evidently refers to the decision in *Comitis v. Parkerson*, 56 Fed. Rep. 556. See, contra, *Pequignot v. Detroit*, 16 Fed. Rep. 211.

"By her marriage to a citizen of the United States Mrs. Constantine became vested with his rights as a citizen of the United States. Upon his death she might revert to her original citizenship or retain her American citizenship. She elects to do the latter, and the fact that she is dwelling in Turkey does not militate against her doing so, the Department having repeatedly ruled that the limitations of permitted residence abroad do not apply to that country." It was therefore held that she was entitled to a passport as a citizen of the United States.

Mr. Hay, Sec. of State, to Mr. Choate, amb. to England, No. 530, Jan. 14, 1901, MS. Inst. Gr. Br. XXXIII, 534.

L., a woman, originally a British subject, went to Canton, in China, and opened a hotel. By the British regulations, British subjects were required, under certain penalties, to take out a license for such purpose. There was no American regulation on the subject. L. claimed to be an American citizen under § 1994, Revised Statutes of the United States, which provides that any woman "who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." She had lately, however, been divorced from her American husband by the judgment of the United States consular court at Niuchwang. The consul at Canton inclined to the opinion that she had by the divorce lost her American citizenship. The minister at Peking expressed the opinion that the divorce had simply dissolved the

marital relations, and that she still remained a citizen of the United States. The Department of State approved this opinion, stating that L., by her marriage, became an American citizen, both by British and by American law; that she had not lost her American nationality by any method recognized by American law; that according to British law an English woman, who by marriage acquires foreign citizenship, must, in order to reacquire her original nationality upon her husband's death, obtain a certificate therefor from the British authorities; that it was not believed that any different rule would be applied where the parties were divorced, and that, as L. claimed American citizenship, it was assumed that she had not taken any steps to reacquire British nationality, and that there was no conflicting claim to her allegiance.

Mr. Uhl, Acting Sec. of State, to Mr. Denby, min. to China, March 17, 1894, For. Rel. 1894, 139.

In 1887 the authorities of the canton of Zurich, Switzerland, applied to the American legation in Berne for a passport for Mrs. Weiss, an insane pauper, as a citizen of the United States. It appeared that she was a native of Zurich, and that she was married at New York in March, 1873, to John Weiss, a native of Baden, who, in the following October, was naturalized. In 1878, however, Weiss and his wife returned to Europe, and in 1880, while they were residing in Zurich, he deserted her, and, it was said, went back to the United States; but since the desertion nothing had been heard of him, and it was not known that he was alive. It was held by the Department of State that her remaining in Zurich after her desertion would, under ordinary circumstances, presumptively revive her Swiss domicil and nationality; that, notwithstanding her lunacy, such a revival might be caused by the election of her local guardians, and that the action of the Swiss authorities, in hunting up the record of her husband's naturalization and asking that a passport be given her, apparently with a view to export her to the United States and thus get rid of the burden of her support, could not be regarded as an assertion in her behalf of American citizenship.

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Jan. 5, and March 19, 1888, For. Rel. 1888, II. 1516, 1531.

### 3. LAW IN OTHER COUNTRIES.

#### § 412.

"In 1862 it was decided by the British Government, in the case of American-born widows of British subjects, that, if the American law was at variance with their own (conferring upon the wives of British subjects the privileges of natural-born British subjects), and the

United States desired to put the American law in force, the American law must prevail, and American-born widows being resident in America would not be entitled to a certificate of being British subjects. The British Government further decided in the case of British-born subjects, the widows of American or foreign husbands, that if after the dissolution of their coverture they should elect to claim the benefit of their British character, they would be at liberty to do so, and must be treated and protected as British subjects. (Parl. Pap. No. 189.)”

1 Halleck's Int. Law (Baker's ed. 1878), 369.

“I have your dispatch No. 68, respecting the case of Mrs. Gordon, formerly Topaz, a Russian woman of the Hebrew faith, who has lately married an American citizen. It is understood that by the laws of Russia she could not, while a subject of Russia, remain in the empire without renouncing her faith and accepting Christianity. You wish to know whether by her marriage to an American such a person, under the statutes of the United States and the first article of the treaty of 1832 with Russia, acquires the right to be exempt from the operation of the municipal laws of Russia.

“The statute of the United States regulating the status of alien women married to American citizens was approved on the 10th of February, 1855. (10 Stat. L. 604.) By this statute it is enacted ‘that any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and be taken to be a citizen.’

“The Attorney-General of the United States in construing this statute has held ‘that irrespective of the time or place of marriage, or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States.’ [Williams, At.-Gen., 1874, 14 Op. 402, 406.]

“There can therefore be no doubt that such a person would, upon her marriage to an American citizen, acquire the right to be regarded by the authorities of the United States as an American citizen in every country except that to which she owed allegiance at the time of her marriage.

“It is understood at the Department that the laws of Russia regard a Russian subject marrying a foreign husband as a foreigner. In such case no conflict of law could arise, because the Russian Government would concede the full American citizenship of the married woman. But should it be otherwise, her relations to that Government would be affected by another opinion of the Attorney-General [Hoar, At.-Gen., 1869, 13 Op. 128], that while the United States may by law

fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not right-fully subject to the authority of any foreign country or government, it ought not, by undertaking to confer the rights of citizenship upon the subject of a foreign nation, who had not come within our territory, to interfere with the just rights of such nation to the government and control of its own subjects."

Mr. Fish, Sec. of State, to Mr. Jewell, June 9, 1874, H. Ex. Doc. 470, 51 Cong. 1 sess. 24.

In 1896 Mr. Breckinridge, then American minister at St. Petersburg, observing in the foregoing instruction an uncertainty as to the actual state of the Russian law, addressed an inquiry on the subject to the Russian foreign office. Mr. Chichkine replied March 14/26, 1896, that "every Russian woman married to a foreigner embraces the nationality of the latter if the marriage has been contracted conformably to Russian law."

Mr. Breckinridge, min. to Russia, to Mr. Olney, Sec. of State, No. 264, March 28, 1896, 48 MS. Desp. Russia.

Mr. Olney, observing the clause "if the marriage has been contracted conformably to Russian law," suggested the inquiry whether the Russian law recognized the general international rule that a marriage valid according to the place of its performance is valid elsewhere. (Mr. Olney, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 218, April 11, 1897, MS. Inst. Russia, XVII. 437.)

The answer is given in the next passage.

The Department of State seems to have thought, in 1863, that the Russian denial of the right of voluntary expatriation extended to Russian women marrying foreigners; but in the statement of this supposition there is no reference to any provision of Russian law at that time. (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Morgan, March 13, 1863, 59 MS. Dom. Let. 564.)

By article 1026 of the Russian Civil Code, Collection of Laws of the Russian Empire, IX., edition of 1876, it is provided: "Every Russian subject who has married a foreigner, and thereby will be considered as a foreigner, has the right after the death of her husband, or after a formal divorce, to resume Russian allegiance, and in this case it will suffice for her to present to the governor of the province in which she may have chosen domicile a special certificate proving her widowhood or divorce. The document delivered by the governor stating that the above certificate has been presented to him will be available to the person in question as proof of her resumption of Russian allegiance."

See Mr. Peirce, chargé d'affaires ad interim, to Mr. Sherman, Sec. of State, Aug. 18, 1897, enclosing a note of Count Lamsdorff, of July 31/Aug. 12, 1897, For. Rel. 1897, 445.

In a case involving the validity of the marriage of a citizen of the United States with a Chinese woman at Canton, China, the ceremony being performed by a Roman Catholic priest, it was stated that "a woman's nationality merges on marriage in that of her husband," and that the Chinese wife of the citizen in question "became, by the mere fact of her marriage, an American citizen."

Opinion of Dr. Francis Wharton, law officer of the Department of State, April 29, 1885, communicated by Mr. Bayard, Sec. of State, to Mr. Smithers, chargé at Peking, May 4, 1885, For. Rel. 1885, 171, 172. See, however, as to the question of merger of nationality, in the case of a Chinese woman married to a citizen of the United States, a contrary view expressed in Mr. Hay to Mr. Conger, Feb. 5, 1903, supra, § 410, p. 458.

In 1888 an agreement was entered into between the German minister at Peking and the tsung-li yamên with reference to jurisdiction over Chinese women who were married to German subjects. The principle was adopted that a Chinese woman married to an alien was subject to the jurisdiction of the laws of her husband's nationality; but it was agreed that the fact of the marriage of a Chinese woman to a German subject should be communicated by the German consul to the local authorities. It was also agreed that the German consular officers should make report of existing marriages; but that, where the parties had failed to request the German consul to report the marriage to the local authorities, and an action at law was brought against the wife, it should be tried and settled by the Chinese authorities. It was also stipulated that, if it appeared that a Chinese woman had been guilty of a crime before her marriage and had married a German subject for the purpose of placing herself under foreign protection, the crime should be punished by the Chinese authorities.

Mr. Denby, min. to China, to Mr. Bayard, Sec. of State, July 9, 1888, For. Rel. 1888, I. 319-321.

"The rule accepted by the Government of China, that places a Chinese woman married to a German under the national jurisdiction of the husband, will probably assist in determining the status, in China, of the Chinese wife of an American citizen, assuming the marriage to be consensual and monogamous; and no special agreement on our part with China or modification of our statute to such end appears to be necessary at present."

Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, Aug. 27, 1888, For. Rel. 1888, I. 349-350.

## VIII. EFFECT OF PARENTS' NATURALIZATION ON INFANTS.

## 1. AMERICAN LAW.

## § 413.

"The children of persons who have been duly naturalized under any law of the United States, . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

Rev. Stats., § 2172; acts of March 26, 1790, 1 Stat. 103; Jan. 29, 1795, § 3, 1 Stat. 414; April 14, 1802, § 4, 2 Stat. 153; *Rexroth v. Schein* (1903), 206 Ill. 80, 69 N. E. 240.

The act of 1802 was intended to operate prospectively as well as retrospectively, and should not be limited to the children of those who had been naturalized at the time of its passage. (*Boyd v. Thayer*, 143 U. S. 135, 177, citing *United States v. Kellar*, 13 Fed. Rep. 82; *West v. West*, 8 Paige, 433; *State v. Andriano*, 92 Mo. 70; *State v. Penney*, 10 Ark. 621; *O'Connor v. The State*, 9 Fla. 215.)

By § 2168, R. S., when an alien, who has made a declaration of intention, "dies before he is actually naturalized, the widow and the children of such alien" may become citizens "upon taking the oaths prescribed by law."

See *Ferguson v. Johnson*, 11 Tex. Civ. App. 413; *Trabing v. United States*, 32 Ct. Cl. 440.

The naturalization of the father does not relate back to the declaration of intention, so as to affect the status of a child who has attained his majority before the father's naturalization. (*Berry v. Hull* (N. M.), 30 Pac. 936. See, also, *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303.)

Under § 4, act of April 14, 1802, a minor child of a father naturalized as a citizen of the United States became a citizen, though not then within the United States, provided she was resident therein at the time of the passage of the act.

*Campbell v. Gordon* (1810), 6 Cranch, 176. See *Behrensmeyer v. Kretz*, 135 Ill. 591, 26 N. E. 704.

Children born abroad of aliens who subsequently emigrated to this country with their families, and were naturalized here during the minority of their children, are citizens of the United States.

*Bates*, At. Gen., 1862, 10 Op. 329; cited in *Mr. Frelinghuysen*, Sec. of State, to *Mr. Brulatour*, July 30, 1883, MS. Inst. France, XX. 594.

It does not suffice that the child was a minor when the parent's declaration of intention was made; he must have been a minor when the naturalization was completed. (*Mr. Cass*, Sec. of State, to *Mr. Medill*, June 14, 1859, 50 MS. Dom. Let. 391.)

A boy of eighteen years, who has never been out of Germany, but whose father is a naturalized citizen of and resident in the United States,

is not entitled to obtain the interposition of this Government to secure him from military service in Germany, or to relieve him from being detained in Germany for that purpose. (Mr. Evarts, Sec. of State, to Mr. Caldwell, Mar. 6, 1880, 132 MS. Dom. Let. 93.)

Section 2172 of the Revised Statutes is regarded "as applicable to such children as were actually residing in the United States at the time of their father's naturalization, and to minor children who came to the United States during their minority and while the parents were residing here in the character of citizens." (Mr. Blaine, Sec. of State, to Mr. Kasson, Mar. 31, 1881, For. Rel. 1881, 52, 53.)

"The laws of the United States on the subject of naturalization provide, in relation to persons situated as your sons are, 'that the children of persons duly naturalized under any of the laws of the United States, . . . being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, *if dwelling in the United States*, be considered as citizens of the United States.' Assuming that your three sons were born in France, accompanied you to this country and have continued to reside here (the fact is not distinctly stated in your letter), they, together with your son born here, are, under the provision just cited, to be considered, when dwelling in the United States, citizens of the United States, with all the rights and privileges attaching to that character, and entitled to the protection which this Government extends to all its citizens in the exercise and enjoyment of these rights.

"This Department does not as a rule undertake to give information upon the laws of other countries, nor as to the construction which those countries may put upon their own laws in applying them to persons found within their territorial jurisdiction."

Mr. Fish, Sec. of State, to Mr. Jouffret, Feb. 11, 1874, 101 MS. Dom. Let. 291. See, also, Mr. Bayard, Sec. of State, to Mr. Cramer, No. 140, May 22, 1885, MS. Inst. Switz. II. 256; Mr. Wharton, Assist. Sec. of State, to Mr. Cook, April 6, 1892, 186 MS. Dom. Let. 21.

A Spanish subject by birth was naturalized in the United States in February, 1876, and thereupon his son, aged twenty, who was born in the Island of Cuba, applied to the State Department for a passport, stating that he had resided in the United States for five years, but that it was his intention to resume his residence in the Spanish dominions and engage in business there. It was held that the son, being a minor at the time of his father's naturalization, must be considered a citizen of the United States within the meaning of section 2172, Revised Statutes, and as such entitled to a passport, and that the circumstance that he intended to reside in the country of his birth did not make him less entitled than if his destination were elsewhere.



Taft, At. Gen. 1876, 15 Op. 114. .

Quaere, however, as to the applicability of the doctrine of double allegiance in such cases, so long as minority continues.

“Under section 2172 of the Revised Statutes of the United States, if, as you state, your father was naturalized while you were a minor, you are by virtue of that fact, if dwelling in the United States, an American citizen, and entitled to protection as such, in case you should be molested upon visiting Germany, your father’s native country.”

Mr. Frelinghuysen, Sec. of State, to Mr. Goldenberg, Dec. 15, 1884, 153 MS. Dom. Let. 437.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 394, 395.

Robert Emden was born in Switzerland in 1862. His father, a native of Switzerland, was naturalized in the United States in 1854, but soon afterwards returned to Switzerland, where he ever afterwards continued to reside. In 1885 the son, who had never been in the United States, applied to the American legation at Berne for a passport. The Department of State held: “The passport application of Mr. Robert Emden, although he is the son of a naturalized American, cannot be granted, because he is not and never has been ‘dwelling in the United States,’ according to section 2172 of the Revised Statutes.”

Mr. Bayard, Sec. of State, to Mr. Cramer, min. to Switz., June 27, 1885, For. Rel. 1885, 806.

To the same effect is the case of Charles Drevet, decided in 1885. (Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, July 2, 1885, For. Rel. 1885, 373.)

See, also, Mr. Rives, Assist. Sec. of State, to Mr. Haus, Dec. 5, 1888, 170 MS. Dom. Let. 697; Mr. Adee, Second Assist. Sec. of State, to Mr. Schmitz, Nov. 5, 1890, 179 MS. Dom. Let. 579; Mr. Rockhill, Act. Sec. of State, to Mr. Breckinridge, min. to Russia, July 21, 1896, For. Rel. 1896, 516-517; Mr. Hill, Assist. Sec. of State, to Mr. Wake-man, March 22, 1899, 235 MS. Dom. Let. 509; Mr. Hill, Assist. Sec. of State, to Mr. Pritchard, March 17, 1900, 243 MS. Dom. Let. 584.

S., a native of Germany, was taken in her infancy to the United States. Her father, who was a German, died soon after his emigration, and his widow married his brother, who was a naturalized citizen. In the autumn S., being then about 24 years of age, and having lived nearly all her life in the United States, went to Germany, temporarily, to study music. She applied soon afterwards to the embassy for a passport, which was granted. The action of the embassy was approved by the Department of State “as being in accord with the principle established by the Haberacker case (F. R. 1891, p. 521).” (Mr. Adee, Acting Sec. of State, to Mr. Runyon, amb. to Germany, April 22, 1895, For. Rel. 1895, I. 534. For Haberacker’s case, see *infra*, § 414.)

"Mrs. Heisinger was born in Altona, Prussia. Her husband was also an alien by birth and came to the United States in May, 1866. He was naturalized August 18, 1871, and died probably not later than 1879. The son Carl was born in Philadelphia, in the State of Pennsylvania, January 21, 1871, more than six months before the naturalization of his father. In 1879 Mrs. Heisinger returned to Germany, taking her son with her, and has ever since resided in that country. . . .

"It is a reasonable interpretation that the words 'if dwelling in the United States' were intended, among other things, to meet the case of conflicting claims of allegiance. In this relation it is pertinent to disclose the origin of those words. On March 26, 1790, an act was approved, entitled 'An act to establish an uniform rule of naturalization' (Stats. at Large, 103). This was the first law enacted by Congress on that subject. The first clauses prescribed the conditions and methods of naturalization. Then followed these words:

"And the children of such persons so naturalized, dwelling within the United States, being under the age of 21 years at the time of such naturalization, shall also be considered as citizens of the United States.

"In 1795 the law of 1790 was repealed by an act of the 29th of January of the former year entitled, 'An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on that subject' (1 Stats. at Large, 414). By the third section of the act of January 29, 1795, it was provided that—

"The children of persons duly naturalized, dwelling within the United States and being under the age of 21 years at the time of such naturalization, and the children of citizens of the United States born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.

"The law on this subject so remained until 1802, on the 14th of April, of which year, an act was approved entitled, 'An act to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject.' (2 Stats. at Large, 153.)

"The fourth section of this act provides that—

"The children of persons duly naturalized under any of the laws of the United States, . . . being under the age of 21 years at the time of their parents being so naturalized . . . shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who are now or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered citizens of the United States.

"It will be observed that in this provision, which is incorporated in section 2172 of the Revised Statutes, the words 'if dwelling in the United States' are transposed. The effect of this transposition was considered by the Supreme Court of the United States in the case of

Campbell v. Gordon (6 Cranch, 176) in 1810. The case involved a title to land, which depended upon the citizenship of one Yanetta Gordon, née Currie, who was by birth a British subject. Her father, also a natural-born British subject, emigrated to the United States and in 1795 was naturalized. His daughter Yanetta was then residing in Scotland, where she remained until 1797, in which year she came to the United States. It was contended by counsel that she was not a citizen of the United States, inasmuch as she was not dwelling in the United States at the time of her father's naturalization. The Supreme Court took a different view of the matter. Mr. Justice Washington, delivering the opinion of the court, said:

“The next question to be decided is whether the naturalization of William Currie conferred upon his daughter the rights of a citizen after her coming to and residing within the United States, she having been a resident in a foreign country at the time when her father was naturalized. Whatever difficulty might exist as to the construction of the third section of the act of January 29, 1795, in relation to this point, it is conceived that the rights of citizenship were clearly conferred upon the female appellee by the fourth section of the act of April 14, 1802. This act declares that the children of persons duly naturalized under any of the laws of the United States, being under the age of 21 years at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon.’

“The effect of the law, as thus expounded, is to make actual residence in the United States, and not residence at the time of naturalization, the test of the claim to citizenship; and here, as explanatory of this rule, it is important to observe the associated provision, found in all the acts above quoted, and incorporated in the same relation in section 2172 of the Revised Statutes, that children born of citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. Under this provision, such children are treated as citizens of the United States, whether dwelling in this country or not, being regarded as citizens of the United States by birth. The preceding provision relates to children born of parents who were not at the time citizens of the United States, and upon whom the country of the parents, under the same rule of law as that announced by this Government, might have claims of allegiance. In respect to such persons, the words ‘if dwelling in the United States’ recognize a possible conflict of allegiance. They also recognize another principle, and that is that it is not within the power of a parent to eradicate the original nationality of his child, though he may, during the minority of such child, invest him with rights or subject him to duties which may or

may not be claimed or performed. For this reason, also, it is provided that children not born citizens of the United States are, by virtue of the naturalization of their parents, to be considered as citizens of the United States 'if dwelling' therein.

"The Department does not desire to be understood to assert that natural-born subjects of a foreign power whose parents have been naturalized in the United States must at every moment be dwelling in the United States in order to claim its citizenship. That question does not arise in the present case. The words 'if dwelling in the United States,' whether meaning residence at a particular moment or contemplating a settled abode, apply to Carl Heisinger, who, being now 19 years of age, has for about 11 years been dwelling in Germany. It is not known that the Government of that country has made any claims upon him. But, if the German Government should, under a provision of law similar to that in force in the United States in relation to the foreign-born children of citizens, seek to exact from him the performance of obligations as a natural-born subject, the Department would be bound to consider the provisions of section 2172 of the Revised Statutes."

Mr. Blaine, Sec. of State, to Mr. Phelps, minister to Germany, February 1, 1890, For. Rel. 1890, 301.

J. W. claimed American citizenship through the naturalization of his father. The latter was born in the Crimea in 1836, came to the United States in 1875, and was naturalized in 1881. Three months later he returned to Russia, where he continued to reside, following the occupation of a farmer. J. W. was born in Russia and returned to that country with his father in 1881, being then nineteen years of age, and afterwards resided there, also following the occupation of farming. In 1891, being then twenty-eight years old, he applied to the American legation at St. Petersburg for a passport. He expressed no intention as to returning to the United States. The Department of State declared that it would not have availed him if he had. Under section 2172, Revised Statutes, said the Department, the children of persons who have been duly naturalized, being under the age of twenty-one years at the time of their parent's naturalization, are, "if dwelling in the United States," to be considered as citizens thereof. J. W., said the Department, "never has dwelt here since attaining his majority, and is not dwelling here now. He is therefore precluded by the statute from claiming the benefits of citizenship of the United States."

Mr. Blaine, Sec. of State, to Mr. Smith, mln. to Russia, No. 79, Feb. 28, 1891, MS. Inst. Russia, XVI. 696.

"With regard to your inquiry as to whether a person residing abroad could be considered as 'dwelling in the United States,' so as to come within the meaning of section 2172, Revised Statutes, I would say that this passage has reference merely to the residence of a minor, who, to be naturalized under the statute, must be 'dwelling in the United States' either at the time of the parent's naturalization or afterwards during his minority. The phrase clearly could not be construed to mean that the person must always be 'dwelling in the United States' in order to be entitled to citizenship. By such interpretation a person claiming citizenship through the parent's naturalization would be precluded from asserting citizenship when not actually within the jurisdiction of the United States. A person properly claiming naturalization under this statute (2172, R. S.) is as completely naturalized as if he had complied with the conditions of the general naturalization laws of the United States, and would not, if he left the jurisdiction of the United States, have to comply with the requirements of Revised Statutes 2167, by taking out naturalization papers for himself."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, March 6, 1899, For. Rel. 1899, 87.

"The fact that a person claiming citizenship through the naturalization of a parent was not himself independently naturalized is quite immaterial." (Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, Feb. 4, 1899, For. Rel. 1899, 84, 85, citing Rev. Stats. sec. 2172.)

"Anton Macek, according to your statement, was born in Vienna, of Austrian parents, August 13, 1875. In May, 1884, **Macek's case.** his father, Alois Macek, emigrated to the United States with his entire family and has resided in Chicago ever since. Before his naturalization and while the son, Anton, was yet a minor—August 16, 1894—the father sent him to Austria to be educated. The father, Alois Macek, was naturalized in the superior court of Cook County, Ill., October 22, 1894—that is, subsequently to the return of the son, Anton Macek, to Austro-Hungarian jurisdiction, where he has since remained.

"You have felt it to be your duty to withhold a passport in the view that section 2172 merely confers citizenship upon minors actually residing in the United States at the time of their father's naturalization, in support of which opinion you refer to the Department's instruction to you, No. 2, of April 1, 1899, the pertinent provisions of which you quote.

"At the same time you submit to the Department the view, which you state is advocated by the consul at Prague, that the words 'dwelling in the United States' refer to the legal residence of a minor which, unless manumitted, is with the parent wherever the minor

may happen to be, so that, although not at the time of the naturalization of the father actually within the jurisdiction of the United States, the son, Anton Macek, may be held to have been vicariously present in the person of the father through whom he then and there became a citizen of the United States, the same as though he had been personally present at his father's home in Chicago.

"Still another view is brought forward, to the effect that the protective force of section 2172 only applies to the minor children of naturalized aliens while such minor children are actually within the jurisdiction of the United States.

"This narrow interpretation is no longer entertained by the Department, although as a proposition in municipal law it has on several occasions in the past been enunciated; but it has been replaced in practice by a quasi conventional interpretation, as will be later shown, by which the acquisition of a parent's citizenship by an alien minor is assimilated to the actual naturalization of the minor himself. . . .

"On page 301 of the volume of Foreign Relations for 1890 you will find a carefully formulated instruction sent by Mr. Blaine to Minister Phelps at Berlin, No. 57, February 1, 1890, in which considerable attention is given to the intent and application of section 2172, Revised Statutes. The purport of that opinion (which is understood to have been prepared by Mr. John B. Moore, then Assistant Secretary, and now a known and recognized authority on matters of international law) is that the effect of the American law is to make actual residence in the United States, and not residence at the time of naturalization, the test to the claim of citizenship, inasmuch as the provision relates to children born of parents who are not at the time citizens of the United States, and upon whom the country of the parent, under the same rule of law as that announced by this Government with respect to the children born abroad of citizen parents, might have claims of allegiance. In respect to such persons the words 'if dwelling in the United States' recognize a possible conflict of allegiance. In the absence of any such conflict of allegiance being adversely raised by the government within whose jurisdiction the minor may be temporarily dwelling, there could be little doubt that the law of the country which naturalized the father would obtain; and in fact it does obtain, by common consent, in the relations of the United States with Germany. In practice, therefore, it may be said that the naturalization of the father operates to confer the municipal right of citizenship upon the minor child, if he be at the time of the father's naturalization within the jurisdiction of the United States, or if he come within that jurisdiction subsequent to the father's naturalization and during his own minority.

"The principle may be broadly stated that no country can naturalize an inhabitant of another country while that person is dwelling

within the jurisdiction of the other country; that naturalization is a municipal act valid within the jurisdiction of the naturalizing power, and that, once performed by due operation of law, it is entitled to respect. It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. . . .

"The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties, where evidence that a minor child has acquired citizenship through the father, according to the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to fulfill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law.

"These points are, however, adverted to for your information merely and not as controlling your action in respect to Anton Macek's application for a passport. Whatever construction be given to section 2172 of the Revised Statutes, it is quite clear that it can not apply to this present case, because the words 'if dwelling in the United States' do not fit the circumstances. The applicant was not dwelling in the United States at the time of his father's naturalization, he has not at any time since dwelt in the United States, and of course is not now dwelling here.

"Your action in withholding the passport from Anton Macek is approved."

Mr. Hay, Sec. of State, to Mr. Harris, min. to Austria-Hungary, Jan. 22, 1900, For. Rel. 1900, 13-15.

That the naturalization of the parent effects, under the treaties [e. g., that with Sweden and Norway], the expatriation of minor children dwelling in the United States, if or after the latter have also resided there five years, see Mr. Sherman, Sec. of State, to Mr. Grip, Swedish min., No. 104, June 15, 1897, 8 MS. Notes to Sweden, 58.

"As stated in my instruction, No. 603, of October 15, 1898, in the case of Jacob Lenzen, the words of the statute 'dwelling in the United States' are held to mean either at the time of the father's naturalization or afterwards during the child's minority."

Mr. Hay, Sec. of State, to Mr. Jackson, chargé at Berlin, Oct. 3, 1900, For. Rel. 1900, 527.

## 2. MARRIAGE OF ALIEN WIDOW TO AMERICAN.

## § 414.

"I transmit herewith copy of a letter addressed to this Department under date of 23d ultimo by Mr. George Haberacker, of Cleveland, Ohio, in relation to the impressment into the Bavarian army of his brother, John Haberacker.

"From this letter, and from the newspaper clipping which accompanied it, the facts of the case may be thus conveniently summarized:

"John Haberacker was born in Windsheim, Bavaria, on August 18, 1869, and has but very recently attained his twenty-first year. His father was a subject of Bavaria, and died in that country in 1883, when John was 14 years old. His widow emigrated to the United States the same year (1883), bringing her minor children with her. Three years later (in 1886) the widow Haberacker married one Andrew Knauss, a Bavarian by birth, but then for thirty-three years a citizen of the United States by naturalization. About three months ago Mr. Knauss and his wife went to Bavaria to visit relatives at Windsheim, taking with them John Haberacker, who had not yet reached full age. They returned in July, leaving John in Windsheim for a further stay of a fortnight. On August 3, a few days before he had arranged to return to the United States, John Haberacker was arrested as liable to military service and taken to Uffenheim, where a partial examination was had. Thence he was taken to Anspach, where he was heard before a military court and adjudged liable to three years' service as a Bavarian subject in the armies of the Kingdom. He was accordingly assigned to the Fourteenth Regiment of Infantry, on duty at Nuremberg, where he was when last heard from.

"The statutes of the United States applicable to the case are as follows:

"SEC. 1994. Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

"SEC. 2172. The children of persons who have been duly naturalized under any law of the United States . . . being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.

"It has been held by our courts that the husband's citizenship confers citizenship upon the wife without application for naturalization on her part or the usual qualifications. There is also an express decision of the United States circuit court (13 Federal Reporter, 82) that upon the marriage of a resident alien woman with a naturalized citizen both she and her infant son, dwelling in this country, become



citizens of the United States as fully as if they had become such in the special mode prescribed by the naturalization laws.

"It is conclusive, therefore, under the laws of this country, that John Haberacker, upon the marriage of his mother to Knauss in 1886, became a naturalized American citizen. That he shall be treated as such by the Royal Government of Bavaria, our treaty with that Government of May 26, 1868, only requires further that he 'shall have resided uninterruptedly within the United States for five years.'

"It is the generally accepted theory in this country that a widowed mother may reasonably and in good faith change the domicil of her minor children. When the boy John Haberacker, therefore, came to this country to live, in 1883, with his mother, his only natural protector, the United States thereby became his domicil. It is understood that in some of the systems of European law, a different view prevails, viz, that the minor's domicil is fixed by the father's death and can not be changed during minority by the mother. The Department is not informed, however, that the law of Bavaria in this regard is different from our own. And in any event, whatever view that Government may entertain as to the legal domicil of Haberacker, with respect, for instance, to such a question as the succession to property in that Kingdom, it is believed that they will agree with us that the facts in this case constitute such an uninterrupted residence in this country as is contemplated by the treaty and bring Haberacker's case within its provisions.

"In this connection the stipulations of Section III. of the supplementary protocol of Munich, signed May 26, 1868, have a pertinent application. It is therein provided that, while Bavarians 'emigrating from Bavaria before the fulfillment of their military duty can not be admitted to a permanent residence in the land till they shall have become 32 years old,' this does not forbid a journey to Bavaria for a less period of time and for definite purposes, and the Royal Bavarian Government cheerfully undertakes, in cases of good faith, 'to allow a mild rule in practice to be adopted.' The emigration of a child of 14 in the care of his widowed mother suggests no bad faith. The child at that age could not have been enrolled for service under a draft, or stood in service under the flag, or broken a leave for a limited time, or failed to respond, while on unlimited leave, to a call into the service to which he belonged—which are the usual conditions under which service is exacted of Germans returning to Germany after naturalization abroad. The general rule now observed in practice throughout the German Empire corresponds with the specific rule laid down in Article II. of the treaty of naturalization of July 19, 1868, between the United States and Baden, and its reasonableness and justice commend it as equitably governing such

cases. Under it emigration, even if transgressing other legal provisions on military duty than the cases of practical desertion or evasion of an accrued and existing obligation to service at the time, which are recited above, does not subject the emigrant on return to be held to military service or to be tried and punished for nonfulfillment of military duty.

"In view of the above, I have to direct you to call the facts in this case to the attention of the Government of Bavaria, in the confident belief that that Government will be pleased to take steps looking to Haberacker's prompt release from his present enforced military service.

"In conclusion, I must caution you not to allow the consideration of this case to be prejudiced by the statement in his brother's letter (George Haberacker) of August 19, 1890, that John, on reaching his legal age, 'had intended to take out his full papers, if necessary, on his return.'

"The brother's supposition that some formal act of the court might be required to confirm his citizenship, but which we have found to be unnecessary, can have no bearing either way."

Mr. Wharton, Act. Sec. of State, to Mr. Phelps, min. to Germany, Sept. 8, 1890, For. Rel. 1891, 496.

"Recurring to the note verbale of the 31st ultimo, the undersigned has the honor to inform the envoy extraordinary and minister plenipotentiary of the United States of America, Mr. William Walter Phelps, that the Royal Bavarian Government does not consider the American citizenship of John Haberacker, now performing military service in Bavaria, as proven. In section 1993, Revised Statutes, the principle is laid down that the citizenship of the father decides that of the children, and it is not to be assumed that this principle, which coincides with all known views of law, was intended to be modified by section 1994 or section 2172.

"As regards section 2172, it, in connection with the two above-cited provisions of law, may, according to the views of the Bavarian Government, well give rise to a doubt that the naturalization of both parents is requisite to convey American citizenship to their minor children also, or whether the naturalization of the father alone is sufficient. From this provision the conclusion can not, however, be arrived at, notwithstanding the conflicting decision of a single American court, that a minor whose father, as in Haberacker's case, has never lived in the United States should acquire American citizenship solely by virtue of the naturalization of his mother.

"The Royal Bavarian Government therefore believes that John Haberacker should continue to serve with the flag, unless it is convincingly proved by appropriate American authority that by the

law of the United States he has acquired American citizenship by the marriage of his mother with an American."

Freiherr von Rotenhan to Mr. Phelps, Feb. 28, 1891, accompanying Mr. Phelps to Mr. Blaine, No. 245, March 2, 1891, For. Rel. 1891, 506, 507.

"Article I. of our treaty with Bavaria, concluded May 26, 1868, provides that—

"Citizens of Bavaria who have become, or shall become, naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States for five years, shall be held by Bavaria to be American citizens and shall be treated as such.

"The reply of the imperial foreign office admits Haberacker's requisite residence in this country, and that whether or not he has become a naturalized American citizen is to be determined solely by the local law of the United States. . . .

"The Bavarian Government entirely overlooks the fact that section 1993, to which reference is made, is not a part of, and does not in any way relate to, our naturalization laws.

"It and the previous section (1992) define who are native-born citizens of the United States. The first of the two sections adopts in its entirety the principle of nationality of origin dependent upon the place of birth. The second section adopts in part only the other theory of dependence upon the nationality of the parents. In this respect the laws of this country do not differ materially from the laws of most other countries, in which both elements, *jus soli* and *jus sanguinis*, as a rule, exist, though not always the same one predominating. (Cockburn on Nationality, chap. 1.)

"Section 1993 is a restrictive statute, and provides, as to children born out of the limits and jurisdiction of the United States, that only those are citizens thereof by birth whose 'fathers' (1) were citizens and (2) were such at the time of the birth of the child, and (3) have at some time resided in this country. These restrictions relate solely to the determination, under the laws of the United States, of the national status of a child at birth. Each of the restrictions may be presumed to have been used intentionally, and all of them, from their very nature, could not have been used in our naturalization laws, even if it had been desired. Excepting the case of posthumous children, every child at birth has a father, and if a child is to inherit citizenship it most properly takes that of the father. The United States could scarcely have claimed the citizenship of children born in a foreign country of an American mother and an alien father, while, on the other hand, if the father was a citizen the mother would be one also under our laws by virtue of her marriage.

"There is no question as to Haberacker's status at birth. It is only on account of being born an alien that he comes within the

purview of sections 1994 and 2172, which relate solely to citizenship by naturalization.

"Those two sections point out some but not all of the several methods by which aliens can be and are admitted to citizenship in this country. Although section 1994 is not found in Title XXX in connection with most of the laws on the subject of naturalization, it is nevertheless solely a naturalization law. It is uniformly held under it that an alien woman, who might herself be lawfully naturalized, by marriage to a citizen becomes herself a citizen without any previous declaration or act on her part, or without reference to the previous length of her residence in this country, as fully to all intents and purposes as if she had become a citizen upon her own application and by the judgment of a competent court.

"Haberacker's mother, by her marriage to Knauss, a citizen, was accordingly 'duly naturalized under any (a) law of the United States.' It only remains to determine whether she is a 'person' within the meaning of section 2172. If so, her minor son, residing with her at the time in this country, likewise became a citizen. The word 'person' may be presumed to have been used as intentionally in this section as the word 'fathers' was used in section 1993. By the death of the father the mother often becomes the natural protector of the child. Such a child can only be excluded from the benefits of section 2172 by a forced construction of its language, which view is also strengthened by the fact that it reads: 'The children of persons who have been duly naturalized under any law of the United States.' It clearly contemplates the case of persons naturalized under other than the regular and usual provision with respect thereto.

"The exact point at issue was decided in the case of the United States *vs.* Kellar (13 Federal Reporter, 82), to which reference was made in Department's instruction No. 146, of September 8. It was decided in the court of next highest jurisdiction to the Supreme Court of the United States, and by Mr. Justice Harlan, one of the most distinguished judges of the Supreme Court. The same question is not known to have ever been passed upon by the Supreme Court, but it is not a question of itself alone appealable to that court. The decisions, however, of the State and Federal courts have been uniform with respect thereto.

"Judge Harlan, in the course of his opinion, said:

"'The case seems to be so distinctly one of those embraced by the very language of section 2172 that argument could not make it plainer.'

"The Kellar case, decided in 1882, is not a 'conflicting decision of a single American court.' I find upon a little investigation that section 2172 has been construed in exactly the same way to confer citi-

zenship upon the minor child of a widow marrying a citizen, in 1885, by the supreme court of the State of New York, in the case of the *People vs. Newell* (38 Hun, 78), and again in 1888 by the supreme court of the State of Missouri, in the case of *Gunn vs. Hubbard* (97 Mo. 321), and I fail to find any cases which, even by implication, throw any doubt upon the correctness of those decisions. In consideration of the uncontradicted opinion of the supreme courts of two of our greatest States and the decision of one of the justices of the Supreme Court of the United States upon this point, it is believed that the Royal Bavarian Government will accept this interpretation as correct in the premises and readily assent to treat Haberacker as an American citizen.

“With reference to the suggestion in your dispatch whether Haberacker is really held to service against his will, I would say that his case was presented to the Department by his brother and strongly urged for immediate action. It has since that time also been the subject of repeated inquiry by the member of Congress representing the district where Haberacker’s family resides. Until the contrary appears, therefore, the Department is bound to believe that he is so restrained. But it is only necessary to request that he be released if he so desires. The opportunity for that having been given, he of course may avail himself of it or not as he chooses.”

Mr. Wharton, Act. Sec. of State, to Mr. Phelps, min. to Germany, March 26, 1891, For. Rel. 1891, 507.

“The undersigned, replying to the note of the 20th of April last (F. O., No. 211), has the honor to inform the envoy extraordinary and minister plenipotentiary of the United States of America, Mr. William Walter Phelps, that the Royal Bavarian Government has made a renewed and thorough investigation of the case of John Haberacker, but finds no reason for discharging him from the Bavarian army.

“The Bavarian Government is guided in this by the following considerations:

“According to the treaty of May 26, 1868, subjects of the Kingdom of Bavaria are to be regarded as Americans only when they become ‘naturalized’ citizens of the United States of America and have resided in that country uninterruptedly for five years. As only the latter of these preliminaries has been performed, it can not therefore be admitted that Haberacker was naturalized in America.

“Under Title XXX. of the Revised Statutes, headed ‘naturalization,’ the manner in which the naturalization of foreigners is to be effected is determined, and in section 2165 it is expressly stated that this is to be done as prescribed therein ‘and not otherwise.’ True, it is stated in section 2172 that minor children of persons duly natu-

ralized are to be regarded as American citizens; but if, on this account, Haberacker's personal naturalization would not be required, it would in all events be necessary that his mother at least had become naturalized. But even this is not the case.

"Haberacker's mother became an American citizen by her marriage with an American citizen, according to section 1994 of the Revised Statutes. This legal provision can not, however, be regarded as a special manner of naturalization. It is not to be found in Title XXX. of the Revised Statutes, headed 'naturalization,' but, as is the case with section 1993, in Title XXV., headed 'citizenship.' In the envoy's note above referred to it is expressly stated that section 1993 is not a part of the American naturalization laws, and in no wise applies to naturalization. The same must be said of section 1994.

"If the word 'naturalized' had been omitted in the treaty of 1868, the above section might perhaps apply to a case such as that now under consideration. This view is debarred by the express use of that word, and it could hardly have been thought of when the treaty was negotiated. For, according to the principles of American law—which in this instance are precisely the same as the German—the marriage of an American woman to a foreigner can not deprive the children of her first marriage of their American citizenship.

"From this standpoint it amounts to nothing that Haberacker, according to American decisions, is regarded as an American citizen. It is enough that he did not become a 'naturalized' citizen of the United States."

Freiherr von Rotenhan to Mr. Phelps, Dec. 1, 1891, For. Rel. 1891, 521.

"The full meaning of such a contention [as that made in the foregoing note] is worthy of notice. If Haberacker is not a naturalized American citizen, it is simply because his mother is not. If she is not, then none of the wives of former subjects of Bavaria naturalized in this country are naturalized citizens and entitled to the protection of the treaty; and its intended scope would be most seriously reduced.

"The inference drawn from these words, 'and not otherwise,' is a superficial one, which an understanding of their historical origin ought to dissipate and the decisions at least completely negative. Title XXX. of the Revised Statutes, relating to naturalization, is based upon the act of Congress of the 14th of April, 1802. That act began as follows:

"That any alien being a free white person may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise.

"The foregoing language was substantially copied into section 2165, although between April 14, 1802, and the revision of the statutes in 1878 there were many general and particular acts of naturalization

which were not brought into Title XXX., and among them section 2 of the act of February 10, 1855, which is embodied in section 1994 of the Revised Statutes. But, giving the words 'and not otherwise' full force and effect, they do not necessarily conflict with other modes of naturalization which the Revised Statutes point out. The same authority which enacted section 2165 also enacted section 1994. It is a fundamental rule of construction that such meanings are to be attributed, if possible, to the different parts of a code of laws that full effect may be given to the whole. That is accomplished in this case by understanding the words 'and not otherwise' as limiting the procedure requisite under the particular modes of naturalization pointed out in Title XXX., and those modes only.

"Whole classes of people, and all persons domiciled under certain conditions within designated geographical limits, have been naturalized by acts of Congress, and even by treaties with foreign powers, without any of the formalities provided for in Title XXX. Mr. Chief Justice Fuller, in delivering the opinion of the Supreme Court in the late case of *Boyd vs. State of Nebraska*, decided February 1, 1892, says:

"It is insisted that Boyd was an alien upon the ground that the disabilities of alienage had never been removed, because he had never been naturalized. Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen, and relator's position is that such adoption has neither been sought nor obtained by respondent under the acts of Congress in that behalf. Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws, under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous."

"The opinion cites numerous examples of such cases. Boyd, who was born in Ireland, had been elected governor of the State of Nebraska, to which office he was ineligible unless an American citizen. Although he had not been naturalized in the manner pointed out in Title XXX., Revised Statutes, still the Supreme Court held that he had been otherwise naturalized, and that he was entitled to hold the office to which he had been elected.

"There are two steps in the naturalization of Haberacker:

"(1) The naturalization of his mother by her marriage to Knauss. This is provided for in section 1994, which is not found in Title XXX.

"(2) His naturalization by virtue of the naturalization of his mother. This is provided for in section 2172, which is a part of Title XXX., and so there can be no question but that it is a naturalization law.

"The whole matter, therefore, turns upon the point whether or not an alien woman, by her marriage to an American citizen, becomes a

naturalized citizen. That she becomes a citizen is admitted, and that she becomes a naturalized citizen can be shown to be equally clear.

"The expression 'shall be deemed a citizen' in section 1994, or, as it was in the second section of the original act of February 10, 1855, 'shall be deemed and taken to be a citizen,' was the language of the bill as it was reported to the House of Representatives on January 13, 1854, by the Judiciary Committee. Mr. Cutting, who was instructed by the committee to report the bill, in doing so said that the section 'was taken in so many words, or in nearly so many words, from the recent act of 1844, Victoria.' That statute (7 and 8 Victoria, c. 66, sec. 16) provides:

" 'That any woman, married, or who shall be married, to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject.'

"Mr. Cutting also said:

" 'The section, in my opinion, ought to be immediately passed, for there is no good reason why we should put a woman into the probationary term required by the naturalization laws, nor to the inconvenience of attending at the necessary courts or places for the purpose of declaring her intentions and renouncing her allegiance, nor, again, put the husband to the expense of the proceeding.' (Cong. Globe, first session, Thirty-third Congress, p. 170.)

"The intention of Congress was clearly to make the effect of the marriage of an alien woman to an American citizen, as regards citizenship, the equivalent of naturalization in the courts, or, as it is more fully expressed in the English statute, that by such marriage she should be deemed and taken to be naturalized.

"If there were any doubt regarding the construction of this statute, the decisions of the courts are explicit and, under our system of jurisprudence, conclusive. The United States circuit court say, in *Leonard vs. Grant* (5 Fed. Rep. 16) :

" 'The phrase "shall be deemed a citizen," in section 1994, Revised Statutes, or as it was in the act of 1855, "shall be deemed and taken to be a citizen," while it may imply that the person to whom it relates has not actually become a citizen by the ordinary means or in the usual way, as by the judgment of a competent court upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word "deemed" is the equivalent of "considered" or "judged;" and therefore whatever an act of Congress requires to be "deemed" or "taken" as true of any person or thing must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, Congress declares that an alien woman shall, under certain circumstances, be "deemed" an



American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of Congress, or in the usual mode thereby prescribed.'

"And Mr. Justice Harlan, in *United States vs. Kellar*, cited above, says:

" 'The marriage of the defendant's mother with a naturalized citizen was made by the statute an equivalent in respect of citizenship to formal naturalization under the acts of Congress. Thenceforward she was to be regarded as having been duly naturalized under the laws of this country.'

"The general purport of the decisions is that an alien woman of the class of persons that can be naturalized is as effectually naturalized, to all intents and purposes, by her marriage to a citizen as if by the judgment of a competent court.

"A complete answer to the whole contention of the Bavarian Government is that there are only two classes of citizens known in our law, viz, natural-born citizens and naturalized citizens. Mr. Chief Justice Fuller, in the late case of *Boyd vs. State of Nebraska*, cited above, defines naturalization to be 'the act of adopting a foreigner and clothing him with the privileges of a native citizen.' And Attorney-General Black, in an opinion to the President, July 4, 1859, said:

" 'What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it in one way. In its popular, etymological, and legal sense it signifies the act of adopting a foreigner and clothing him with all the privileges of a native citizen or subject.' (9 Op. 359.)

"The publicists are to the same effect. Calvo says (*Le Droit International*, fourth edition, par. 581):

" 'La naturalisation est l'acte par lequel un étranger est admis au nombre des naturels d'un État et par suite obtient les mêmes droits et les mêmes privilèges que s'il était né dans le pays.'

"Where our law makes a child a citizen at the moment of birth, whether that be because born within the United States (as provided in section 1992 and in the fourteenth amendment to the Constitution) or because born of American parents abroad (as provided in section 1993), such a child is a natural-born citizen. If, however, a person is born an alien, there is no way by which he can be made a citizen except by adopting him and clothing him with the privileges of a native citizen, which is naturalization.

"The position of the Royal Bavarian Government is not strengthened by the contention of Baron Rotenhan's note that by both the German and American law, which, he alleges, 'in this instance are precisely the same,' the marriage of a German or American woman to a foreigner can not deprive the children of her first marriage of their

native citizenship. I refrain from any discussion whether the foregoing is, in fact, American law, as in any event it is immaterial to the present case. The very cases contemplated by the treaty are those of conflicting claims to the allegiance of the same person. If by the laws of Bavaria every Bavarian that became a naturalized citizen of the United States ceased, *ipso facto*, to be a Bavarian subject, and by the laws of the United States every native American that became a naturalized citizen of Bavaria ceased likewise to be an American citizen, there would have been no occasion for the treaty. It was necessitated by the very fact that it was or might be possible for the same person to be claimed as a citizen or subject of both countries. By its provision it is wholly unimportant whether or not under Bavarian law Haberacker at his naturalization in America ceased to be a Bavarian subject. The treaty provides that, having been so naturalized and having resided within the United States uninterruptedly for five years, he shall be treated by Bavaria as an American citizen.

"In my first instruction to you regarding this case, September 8, 1890, I said:

"It is conclusive, therefore, under the laws of this country that John Haberacker, upon the marriage of his mother to Knauss, in 1886, became a naturalized American citizen."

"The foregoing was repeated, in its exact language, in Mr. Coleman's note to the imperial foreign office on September 23, 1890. At the very beginning it was admitted, as it must have been, that the determination of that question was dependent solely upon the laws of the United States. I can not refrain, therefore, from expressing regret that the deliberate and well-considered statement of this Government as respects its own law should not have been accepted by the Imperial Government of Germany. By reason of this protracted discussion Haberacker has already been held to more than one-half of the term of service to which, as it is thought must now plainly appear to its satisfaction, he was unlawfully adjudged. He is entitled to be released therefrom, and you are directed to present the foregoing views to the imperial foreign office, with a renewed request that action to that end may promptly be taken by the Royal Bavarian Government."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, March 19, 1892, For. Rel. 1891, 522, 524-527.

"The undersigned has the honor to inform the envoy extraordinary and minister plenipotentiary of the United States of America, Mr. William Walter Phelps, that, according to information received from the Royal Bavarian Government, John Haberacker deserted on March 31, 1891, and has not as yet been captured.

"As the affair has actually been settled hereby, the undersigned assumes that he may refrain from a further discussion of the questions which have arisen, but begs to remark that the Royal Bavarian Govern-

ment, after renewed investigation, still maintains, as heretofore, the entire correctness of the views which have been set forth in the undersigned's note of December 1 last." (Freiherr von Rotenhan to Mr. Phelps, Nov. 28, 1892, For. Rel. 1892, 199.)

In consequence of the position taken by the Bavarian Government, the Department of State, though it would again urge its own view, is unable in such a case to give an assurance of immunity in the event of the return of the person to his original jurisdiction. (Mr. Ades, Act. Sec. of State, to Mr. Bock, Aug. 3, 1895, 203 MS. Dom. Let. 645).

In connection with the Haberacker case, see that of Herman F. Buss, the illegitimate child of a woman by a man who was at the time married, but who afterwards secured a divorce and married the child's mother, subsequently to his naturalization. The word "children" in the act of 1802 (R. S. 1993) had been held in a Maryland court to apply only to legitimate children. It was stated in a note of the German foreign office that a bastard was not legitimated by the subsequent marriage of the parents where the father was at the time of the child's birth married. The embassy was instructed to inquire into this point, under German law. (Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, No. 783, March 3, 1899, MS. Inst. Germany, XX. 659.)

Two persons, sister and brother, one of age and the other a minor, who were born in Canada to British subjects, but whose mother, after their father's death and during their minority, married an American citizen and brought them to the United States to live, were entitled to obtain passports from the American embassy at Berlin.

Mr. Hay, Sec. of State, to Mr. Jackson, chargé, Oct. 3, 1900, For. Rel. 1900, 527.

Sec. also, Mr. Hay, Sec. of State, to Mr. Harris, min. to Aust-Hung. Jan. 22, 1900, For. Rel. 1900, 13-15.

### 3. ADOPTION OF CHILDREN.

#### § 415.

"The only mode of adoption by which a private citizen can confer citizenship upon an alien is that of marrying a female of foreign birth."

Mr. Fish, Sec. of State, to Mr. Morris, Feb. 26, 1870, MS. Inst. Turkey, II. 272.

A citizen of the United States can not, by adopting a child of foreign nationality, confer on such child the privileges of citizenship in the United States.

Mr. Fish, Sec. of State, to Mr. Rand, Jan. 6, 1872, 92 MS. Dom. Let. 142.

"There are but three methods known to me for obtaining the rights of an American citizen. Those entitled to such rights are:

“(1) Children born in the United States, and subject to the jurisdiction thereof.

“(2) Children born of American parents whose fathers have resided within the United States; and,

“(3) Those embraced by the naturalization law, which would include those naturalized and their children minors at the time of naturalization, if within the jurisdiction of this country.

“I can not see that this child born abroad presumably of foreign parents is by the act of adoption under a State law brought within either of these provisions prescribing United States citizenship.”

Mr. Frelinghuysen, Sec. of State, to Mr. Willis, M. C., Feb. 21, 1884, 150 MS. Dom. Let. 86.

“The naturalization laws of the United States contain no provision as to the effect on the status of an alien minor of adoption by a citizen of the United States; and it has been held that a citizen of the United States can not, by adopting a child of foreign nationality, confer on such child the privileges of citizenship in the United States. But even supposing the general rule were otherwise, it would seem unquestionable that, where the law does not permit the naturalization of persons of a certain race, and thus excludes them from citizenship, citizenship can not be conferred on them by adoption.”

Mr. Bayard, Sec. of State, to Mr. McCartee, Oct. 15, 1886, 161 MS. Dom. Let. 641.

In this case Mr. Bayard declined to issue a passport to a Chinese woman who was adopted in China by an American citizen and who desired to go to Japan as a medical missionary in the service of an American missionary society. Mr. Bayard stated that, in the view the Department took of the case, it was not important to inquire as to the validity of the adoption under Chinese law.

That adoption does not have the effect of naturalization, see Mr. Adey, Second Assist. Sec. of State, to Mr. Goepel, Sept. 13, 1888, 169 MS. Dom. Let. 657.

The nationality of a servant does not follow that of the master. (Mr. Wharton, Assist. Sec. of State, to Messrs. Macy & Co., April 25, 1889, 172 MS. Dom. Let. 588.)

#### IX. NATURALIZATION INTERNATIONALLY INEFFECTIVE AS TO ABSENT FAMILY.

##### 1. MARRIED WOMEN.

#### § 416.

“I have to acknowledge the receipt of your letter of the 21st ultimo in relation to the impediment interposed to the embarkation from Italy of the wife and children of Mr. Dominick Valon, a native of that Kingdom, now a naturalized citizen of the United States.

It may be open to question whether the act of Congress of February 10, 1855, declaring to be a citizen any woman who might be lawfully naturalized and who has married a citizen of the United States, can be deemed to have operated upon a woman who has never been within the jurisdiction of this Government. This doubt renders it inexpedient to issue a passport to the lady in question, as the law requires that passports be issued only to citizens of the United States. The facts of the case will, however, be communicated to our consul at Naples with instructions to use his good offices to procure the withdrawal by the state authorities of all obstacles to the emigration of Mrs. Valon and her children."

\ Mr. Seward, Sec. of State, to Mr. Tinelli, April 1, 1868, 78 MS. Dom. Let. 275.

"While the general rule is that the wife and minor children share the fortunes of the husband and father, it is necessary that they should in fact partake of his change of domicil and allegiance, and it has been held that the naturalization of an alien in the United States does not require this Government to regard as American citizens those members of his household who have never been within the jurisdiction of the United States, but have remained in the land of their original allegiance."

Mr. Rives, Assist. Sec. of State, to Mr. Smith, December 13, 1888, 171 MS. Dom. Let. 82.

Although Attorney-General Williams, in his opinion of June 4, 1874, 14 Op. 402, referring to *Kelly v. Owen*, 7 Wall. 496, and to certain other cases, stated that the authorities "go to the extent of holding that, irrespective of the time or place of marriage or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States," "yet in view of the obstacles to claiming for the laws, judicial decisions, and executive opinions of the United States effective validity beyond the jurisdiction of the United States, this Department prudently refrains from asserting its application to the case of an alien wife continuing within her original allegiance at the time of her husband's naturalization in the United States, inasmuch as the citizenship of the wife might not be effectively asserted as against any converse claim of the sovereignty within which she has remained. The result would naturally be a conflict of private international law, wherein the state within whose actual jurisdiction the wife remains might be found to have the practical advantage of the argument."

Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, Feb. 9, 1893, For. Rel. 1893, 598.

Naturalization in the United States has no international effect on the allegiance of the wife and children of the naturalized person while they continue to reside in the country of origin.

Mr. Gresham, Sec. of State, to Mr. Watrous, Jan. 23, 1895, 200 MS. Dom. Let. 346; Mr. Olney, Sec. of State, to Mr. Adadourian, Jan. 7, 1896, 207 MS. Dom. Let. 47; to Mr. Platt, Jan. 14, 1896, 207 id. 173; to Mr. Sarkissian, Feb. 13, 1896, id. 684; to Mr. Hawley, April 16, 1896, 209 id. 393; to Mr. Hitchcock, June 8, 1896, 210 id. 538; to Mr. Baker, June 29, 1896, 211 id. 146; Mr. Day, Assist. Sec. of State, to Mr. Jelallan, Nov. 29, 1897, 223 id. 35.

This rule a fortiori applies to other relations, such as that of mother or sister. (Mr. Olney, Sec. of State, to Mr. Torrey, June 17, 1896, 210 MS. Dom. Let. 686; to Mrs. James, July 18, 1896, 211 id. 410.)

## 2. INFANTS.

### § 417.

As has just been seen (*supra*, § 413), the laws of the United States expressly provide that the naturalization of the parent shall operate to change the nationality of minor children only in case the latter have dwelt in the United States, in the sense heretofore explained.

A native of the canton of Vaud, who had been naturalized in the United States, invoked the intervention of the United States in order to secure the removal of his children to the United States. It appeared that by proceedings in his native country, which took place prior to his change of allegiance, he was divorced from his wife, and the custody of his children was assigned to her. He had demanded their custody from the authorities of the canton of Vaud, but without effect. The Department of State said: "The fact of your having become a citizen of the United States has the effect of entitling you to the same protection from this Government that a native citizen would receive; but it cannot operate to destroy or to weaken in any way the authority of the canton of Vaud over its native-born citizens who have never been out of its jurisdiction, nor the exclusive rights of the tribunals, to whom the administration of its laws is committed, to decide all questions which may arise between such citizens."

Mr. Buchanan, Sec. of State, to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330.

"As the question as to the right of your daughter, who is a minor, to leave her native country for the purpose of joining you in the United States, appears to be one over which the authorities of the former have exclusive jurisdiction, and as these have decided against

that right, it is conceived that there is no occasion for the interference of this Department in the matter."

Mr. Trescott, Assist. Sec. of State, to Mr. Capelle, June 18, 1860, 52 MS. Dom. Let. 358.

### 3. GOOD OFFICES FOR EMIGRATION.

#### § 418.

"Your letter of the 6th of April, and the prior correspondence, touching your request for the intervention of this Government to secure the emigration from the Turkish dominion of persons connected with you by ties of family or relationship, and whom you left in Turkey when you came to the United States, has been maturely considered and has been made the subject of consultation with the Treasury Department, under whose supervision the laws to regulate immigration are executed.

"Your request is one of a rapidly increasing number of a similar character of which this Department has lately been the recipient. In one or two instances the Department has granted the request to the extent of permitting an unofficial mention of the case by the minister, but further reflection, excited by the increasing number of applications, has led to the conclusion that intervention in such cases is not compatible with our legislation or with the method provided for its enforcement.

"In the first place, in order to assure itself that it was not soliciting something directly contrary to the letter or the spirit of our laws, the Department would have to make an investigation of the character of the applicant for intervention and of his ability to take care of those whose immigration he seeks. In the second place, it would be essential to institute inquiries abroad concerning those whose coming hither was desired, in order that it might not turn out that those whom this Department had assisted to emigrate could not be permitted to land.

"To these very grave and weighty reasons must be added the consideration that it is not the part of this Government to solve questions of allegiance or claims of duty for persons who are subject to and reside in a foreign country, and who are left in such country by one who, knowing the laws of the land of his origin, comes to this country alone.

"While the Government of the United States welcomes the honest and thrifty immigrant, it does not go so far as to employ the methods of diplomacy in an endeavor to secure the suspension of measures which other Governments may adopt to prevent the emigration of their subjects. On the contrary, this Government has in several of

its treaties expressly recognized the competency of Governments to employ such measures."

Mr. Wharton, Acting Sec. of State, to Mr. Terzian, May 14, 1891, 182 MS. Dom. Let. 9.

See also, Mr. Wharton, Act. Sec. of State, to Sec. of Treasury, March 24, 1891, 181 MS. Dom. Let. 310.

The Department of State, December 15, 1892, instructed the American legation at Constantinople to use its good offices to secure permission for the family of Mr. Michaelian, a naturalized citizen of the United States, to leave Turkey. The legation, having satisfied itself that Mrs. Michaelian intended to come with her children to the United States, issued to her a passport. The Department stated that the legation in so doing appeared to have exceeded its instructions, which contemplated intercession, so far as it might be practicable and proper, with the Ottoman authorities, whose inaction or prohibition was detaining Mrs. Michaelian and her children at Constantinople at much expense and inconvenience to them. As to the minor children of Mrs. Michaelian, the case, said the Department, was clear, since they had never at any time dwelt in the United States, and, therefore, were not citizens under sec. 2172 of the Revised Statutes. The legation was not to withdraw the passport which it had issued, but, in case the Turkish Government contested the evidence of the passport, was to use its good offices as was originally contemplated.

Mr. Foster, Sec. of State, to Mr. Thompson, min. to Turkey, Feb. 9, 1893, For. Rel. 1893, 598.

See, also, same to same, Dec. 15, 1892, id. 591. Affirmed in Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Aug. 9, 1893, For. Rel. 1893, 606.

"The second branch of the Senate inquiry covers two distinct matters. It is asked, in the first place, whether the families of such naturalized citizens residing in Turkey are permitted to leave that country and come to the United States. By 'the families of such naturalized citizens' the resolution is presumed to mean the wives and minor children, who alone might, when within the jurisdiction of the United States, be held to acquire citizenship through the naturalization of the husband or father.

"The naturalization laws of the United States being obviously framed to permit the bestowal of the franchise of citizenship upon certain persons of alien birth who are within its jurisdiction, and the application of these statutes being intrusted to the judicial branch, it is clear that they can not operate to naturalize by indirection or by executive interpretation a person who is an alien by birth and



origin, who has never been within the jurisdiction of the United States, and who at the time may be dwelling within a foreign jurisdiction.

"The Turkish Government has on several occasions permitted the emigration of the wives and children of Turkish subjects who had come to the United States and here acquired citizenship, leaving their families behind them. It has even permitted the emigration of other kinsmen of a degree not within the purview of the naturalization laws of the United States. It has also, asserting a discretionary power in the premises, refused to permit the emigration of the families of naturalized Armenians, even within the marital or filial degree. The good offices of the United States minister are uniformly exerted on all proper occasions to assist the emigration of such persons, upon permission properly secured from the Turkish authorities, and, when funds have been assured to pay the journey, he has assisted their departure. He has likewise assisted the coming to the United States of the wives of citizens of Armenian origin, who, being in this country at or subsequent to the naturalization of their husbands, have returned to Turkey; and of the children of such citizens, born abroad subsequent to the naturalization of the father or who may have acquired American citizenship by actual presence in the United States subsequent to the father's naturalization, and in such instances permission for the families to emigrate has been demanded as of right. These latter instances, however, are relatively few in number compared with the cases in which good offices have been exerted, with varying success, to procure the emigration from the Turkish dominions of the kindred of a naturalized Armenian, including the parents, brothers, and sisters, and even relatives of remoter degree, who could not become citizens of the United States except by individual naturalization."

Report of Mr. Olney, Sec. of State, to the President, Jan. 22, 1896, in response to an inquiry of the Senate "first, whether naturalized citizens of the United States of Armenian birth are allowed to visit Turkey on business or to visit their families, and whether United States passports held by them are recognized by the Turkish Government; secondly, whether the families of such naturalized citizens residing in Turkey are permitted to leave that country and come to the United States." (S. Doc. 83, 54 Cong. 1 sess.; For. Rel. 1895, II. 1471-1473.)

The Department of State declined to solicit permission for the emigration from Turkey of a minor brother. (Mr. Moore, Assist. Sec. of State, to Mr. Greene, May 14, and May 24, 1898, 228 MS. Dom. Let. 486, 227 id. 589.)

Personal good offices were used in the case of an intended wife. (Mr. Hay, Sec. of State, to Mr. Straus, min. to Turkey, Feb. 20, 1899, MS. Inst. Turkey, VII. 322.)

It was stated that a request might be made "that permission be granted as an act of grace" for the emigration of the wife and minor children of a person who had only made a declaration of intention. (Mr. Hay, Sec. of State, to Mr. Sulloway, Feb. 4, 1901, 250 MS. Dom. Let. 536.)

Oct. 16, 1896, the American minister at Constantinople advised his Government that he had obtained a telegraphic order from the Turkish Government to permit the departure for the United States, with safe-conduct to the seaport, of all the native Armenian women and children in whose behalf he had made application, whose husbands and fathers were in the United States. The Department of State replied that the humane and considerate action of the Turkish Government in the matter was "most cordially appreciated."

During November and December, 1896, Mr. Terrell reported the departure to the United States of numerous wives and children of naturalized citizens of the United States.

For. Rel. 1896, 924, 925.

"After long insistence and many unfulfilled promises on the part of the Turkish Government, peremptory orders have at last been procured to permit the emigration of the wives and children of a number of men of Armenian origin now in the United States, and many of them have already departed from Turkey. This friendly act of deference is appreciated, and it is trusted that no further obstacles will be interposed to the escape of these unfortunate people from the perils which unhappily appear to menace their race in the Ottoman territories." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxxix.)

The minister of the United States having on several occasions been embarrassed by the arrival at Constantinople of the wives and minor children without the means of pursuing their journey to the United States, the Department of State adopted a rule requiring the deposit with it of sufficient funds in the form of a draft on London, payable to the order of the United States consul-general at Constantinople, to defray the expenses of their journey to America, as a condition precedent to the use of good offices, or, in lieu of such deposit, a satisfactory assurance that the persons in question had sufficient funds for the purpose. (Mr. Hay, Sec. of State, to Mr. Straus, min. to Turkey, Feb. 24, 1899, MS. Inst. Turkey, VII. 323; Mr. Adee, Acting Sec. of State, to Mr. Terakian, Aug. 15, 1900, 247 MS. Dom. Let. 175; same to Mr. Griscom, Sept. 14, 1900, MS. Inst. Turkey, VII. 468; Mr. Hill, Assist. Sec. of State, to Mr. Nakash, Oct. 31, 1900, 248 MS. Dom. Let. 588; Mr. Hay, Sec. of State, to Mr. Nakash, Feb. 9, 1904, 272 MS. Dom. Let. 243; Mr. Hill to Mr. Mahoney, Nov. 23, 1900, 249 MS. Dom. Let. 223; Mr. Hill, Acting Sec. of State, to Mr. Baboyan, Jan. 7, 1901, 250 MS. Dom. Let. 100; Mr. Hill, Assist. Sec. of State, to Mr. Kaproullian, Feb. 1, 1901, 250 MS. Dom. Let. 499; Mr. Hay, Sec. of State, to Mr. Sulloway, Feb. 4, 1901, 250 MS. Dom. Let. 536.)

A request was made for the interposition of the Government of the United States to obtain permission for the return to the United States

of the wife and two minor children of a naturalized American citizen of Turkish origin, residing at Paterson, N. J. It appeared that the wife, after her husband's naturalization, went on a visit to Turkey, taking with her her two minor children, who were born in the United States. The Department of State replied that, as the wife had been in the United States "at the time of and subsequent to her husband's naturalization, and her children having been born in this country," the American minister at Constantinople would be instructed "to demand as of right permission for them to leave Turkey."

Mr. Olney, Sec. of State, to Mr. Van Hovenberg, Feb. 25, 1896, 208 MS. Dom. Let. 173.

See, in this relation, Mr. Olney, Sec. of State, to Mr. McCollum, Oct. 18, 1895, 205 MS. Dom. Let. 389.

In 1895, Mr. Cinnamon, of Taylor, Texas, requested the good offices of the Government of the United States to obtain for his family, and also for his brother-in-law and the latter's family, permission to leave Russia. The minister of the United States at St. Petersburg, under instructions of the Department of State, requested the necessary permission for the Cinnamon family, but merely transmitted Mr. Cinnamon's request in regard to the others, since they were all Russian subjects. The Russian Government replied "that, according to the laws in force, all requests of this nature should be addressed directly, under the form of petitions, signed by those interested themselves, to the ministry of the interior if it is a question of nationality, or to the governor of the respective province if it is a question of obtaining a passport to go abroad."

For. Rel. 1895, II. 1122-1123.

## X. PROOFS OF NATIONALITY.

### 1. EVIDENCES OF CITIZENSHIP.

#### § 419.

Passports, certificates of naturalization, registration in the consulates of the United States, and service on ships sailing under the flag of the United States, were "alike accepted by our consular officers and the Spanish authorities as *prima facie* evidence of citizenship establishing the rights of the claimants to the treatment secured to our citizens under our treaties and protocols with Spain."

Report of Mr. Olney, Sec. of State, to the President, Jan. 22, 1897, For. Rel. 1896, 746, in relation to arrests made by the Spanish authorities in Cuba since the breaking out of the insurrection, Feb. 24, 1895. The same report is printed in S. Doc. 84, 54 Cong. 2 sess.

For numerous decisions as to the requisite proofs of citizenship, see Moore, Int. Arbitrations, III. 2531-2537.

As to residence at time of annexation, see *Moore*, Int. Arbitrations, III. 2542.

As to official recognitions as evidence of citizenship, see *Moore*, Int. Arbitrations, III. 2543-2547; and, as to the performance of political acts, see *id.* 2547-2548.

A person 23 years of age, who was born in Hayti, who had never been in the United States and who expressed no intention of coming thither, applied to the United States legation at Port au Prince to be registered as an American citizen. He claimed citizenship through his father, who left the United States forty-one years before and had never returned, and whose only evidence of American citizenship was a paper under the seal of the State of Louisiana, signed by the governor thereof, in which he was styled a resident of that State. Held, that the application for registration was properly declined.

For. Rel. 1901, 280.

## 2. PROOF OF NATURALIZATION.

### (1) THE JUDICIAL RECORD.

#### § 420.

The proper evidence of naturalization is the judicial record, or an exemplified copy of it, and parol evidence is admissible only in case of the loss or destruction of such record.

*Green v. Salas*, 31 Fed. Rep. 106; *Slade v. Minor*, 2 Cranch C. C. 139; *Dryden v. Swinburne*, 20 W. Va. 89; *People v. McNally*, 59 How. (N. Y.) Pr. 500; *Bode v. Trimmer*, 82 Cal. 513; *Prentice v. Miller*, *id.* 570.

This rule applies to a woman who alleges citizenship through the naturalization of her husband. (*Belcher v. Farren*, 26 Pac. 791.)

A mere certificate of the clerk of the court, stating that the applicant had been naturalized, is not competent proof, and cannot be aided by parol evidence. (*Green v. Salas*, *supra.*)

A passport issued by the Department of State is not competent judicial proof of citizenship. (*In re Gee Hop*, 71 Fed. Rep. 274; see, also, *Urtetiqui v. D'Arcy*, 9 Pet. 692.)

As to proof of citizenship in the case of locators of mines, see *Hammer v. Garfield Co.*, 130 U. S. 291.

The fact that an alien assumed to make leases and perform other acts which only a citizen might do is of no probative force in establishing his naturalization. (*Richardson v. Amsdon* (1903), 85 N. Y. Supp. 342.)

Proof that defendant on a certain day was admitted to citizenship of the United States and took the usual oath is *prima facie* evidence that he was previously an alien. (*Peacock v. United States* (1903), 125 Fed. Rep. 583, 60 C. C. A. 389.)

It is not necessary that the judgment of naturalization should expressly state that the requisite prior declaration of intention was made; and it is not to be implied from the absence of such a statement that the declaration was not made.

Mr. Hay, Sec. of State, to Count Vinet, Italian chargé, Sept. 1, 1890, For. Rel. 1890, 458, 459; citing *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420; *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238; *Campbell v. Gordon*, 6 Cranch, 179.

McC., a native of Ireland, was admitted to citizenship of the United States at San Francisco in 1864. In the record of his naturalization it was recited that he came to the United States in 1852. He subsequently became convinced that he arrived in 1853 instead of 1852, and, a question having been raised as to the validity of his naturalization, applied to the court to renaturalize him, if in its opinion his former naturalization was defective or open to question. The court held that the judgment of naturalization was not impaired by the inaccurate statement of fact in the recital, it appearing that the conditions of the law, which required only a five years' residence, had in any event been fulfilled.

In re McCoppin, 5 Sawyer C. C. 630.

Where the name of a person is misstated in a certificate of naturalization, the true name may be proved by parol; nor does the inclusion of two names in the record, though an informality, vitiate it (*Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.)

A person who obtains a legal change of name is not entitled to have his certificate or record of naturalization changed accordingly. (In re Nigri, 32 Misc. 392, 66 N. Y. S. 182.)

Where a court, by way of amending its records, entered a judgment of naturalization *nunc pro tunc*, thirty-three years after judgment was alleged to have been rendered, but no entry or memorandum of any kind of the alleged original judgment existed, it was held that the order was invalid, the power to amend not involving the power to create.

*Gagnon v. United States* (1904), 193 U. S. 451.

"The recitals of the certificate of naturalization, a copy of which accompanies your dispatch, on this point are: 'That he resided in the United States three years next preceding his arriving at the age of twenty-one years, and has continued to reside therein to this time; and that he has resided within this State for one year preceding this date, and that he is twenty-one years of age, and that he has resided five years within the United States, including the three years of his minority.'

"I am of opinion that these conditions amount to a fulfillment of the requirements of the law in the class of cases to which that of R—

belongs. Statutes enlarging or conferring personal rights are to be construed liberally, in contradistinction to those which abridge or take away such rights. This liberal rule of judicial interpretation, in harmony as it is with our system of Government, has been, so far as I am aware, uniformly respected and followed by the executive branch of the Government."

Mr. Fish, Sec. of State, to Mr. Davis, Dec. 20, 1875, MS. Inst. Germ. XVI. 133.

In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue; the burden of proving naturalization rests upon the party that alleges it.

*Hauenstein v. Lynham*, 100 U. S. 483.

Evidence that a person born in the United States, of parents who were citizens thereof, came to Texas while it was part of Mexico, with his mother, a widow, in 1831, left there in 1835, was married in Louisiana, and was again living in Texas from 1859 to 1863, does not prove that he became a citizen of Mexico or require any evidence from defendant to the contrary; plaintiff's right being based on the claim that such person did become a Mexican citizen.

*Ferguson v. Johnson* (Tex. Civ. App.), 33 S. W. 138.

Where an inquiry was made of the Department of State in regard to the citizenship of a person at one time minister resident of the United States to Costa Rica, the Department replied: "The papers on the Department's files in support of Mr. Riotte's application for appointment mention him as a naturalized citizen of the United States. His certificate of naturalization is not, however, among them, and in its absence the Department could not say that he was a citizen of the United States, although, as aliens are not appointed to our diplomatic service, the presumption is that the appointing power at the time was satisfied that he was such. I enclose, as requested, a certificate of Mr. Riotte's services as minister resident."

Mr. Sherman, Sec. of State, to Mr. Birkins, April 20, 1898, 227 MS. Dom. Let. 462.

## (2) LOSS OR DESTRUCTION OF RECORD.

### § 421.

B., at a general election held in Nebraska in November, 1890, received the highest number of votes for governor.  
Question of fact. His title to the office was contested on the strength of the clause of the State constitution which declares that no person

shall be eligible to the office of governor who shall not have been for two years next preceding his election a citizen of the United States and of the State.

B. was born in Ireland in 1834 of Irish parents. He was brought to the United States in 1844 by his father, in regard to whom the following facts appeared:

He settled in Ohio, where in 1849, in a court of Muskingum county, he made a declaration of intention to become a citizen of the United States; in 1870 he was elected a justice of the peace, an office which he held for several years; he also held for several years another office, under the constitution and laws of the State; he exercised the rights of a citizen of the United States and voted at elections; but in October, 1890, on applying for registration to vote, under a new law which required the production of citizenship papers, he was unable to find any certificate or record of his naturalization, and, on application to the court in which he had formerly made his declaration of intention, he was admitted to United States citizenship.

The facts in regard to B. were as follows: On attaining his majority, in Ohio, he exercised the elective franchise; in 1856 he settled in Douglas County, Nebraska, where in 1857 he was elected county clerk; in 1864 he volunteered, was sworn in, and served as a soldier of the United States to defend the frontier from an Indian attack; in 1866 he was elected a member of the Nebraska house of representatives, and served one session; in 1871 he was elected and served as a member of a State constitutional convention, and in 1875 was elected and served as a member of the convention by which the State constitution then (1892) in force was framed; in 1880 he was elected and acted as president of the city council, and in 1881 and 1885 was elected mayor of Omaha. From the time of his settlement in Nebraska he voted at all elections, territorial, State, municipal, and national. In assuming the various official functions which he discharged he took the necessary oaths, including the oath to support the Constitution of the United States, and (prior to the admission of the State) the provisions of the organic act under which the Territory of Nebraska was created. He never was judicially admitted to citizenship, except that, after his election as governor, when he learned that his citizenship was questioned, he was, on a petition setting forth the facts, declared and adjudged by the United States District Court for the District of Nebraska to be in fact and in law a citizen of the United States.

On an information to oust B. from the office of governor, it was maintained by the relator that B's father never was naturalized and never became a citizen of the United States while B. was a minor, nor till 1890, when B. was 56 years of age; and that, as B. himself had not been naturalized, he was not a citizen.

In his answer, B., after referring to the declaration of intention made by his father in 1849, and averring that the latter had for forty-two years exercised all the rights and discharged all the duties of a citizen of the United States, and was "in all respects and to all intents and purposes a citizen of the United States and of the State of Ohio," alleged, "on information and belief, that prior to October, 1854, his father did in fact complete his naturalization in strict accordance with the acts of Congress known as the 'naturalization laws' so as to admit and constitute him a full citizen of the United States thereunder."

To B.'s answer the relator demurred.

*Held* (Mr. Justice Field dissenting on grounds of jurisdiction)—

1. That, while the usual proof of naturalization is a copy of the record of the court, yet, "where no record of naturalization can be produced, evidence that a person, having the requisite qualifications to become a citizen, did in fact and for a long time vote and hold office and exercise rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen." *Blight v. Rochester*, 7 Wheat. 535, 546; *Hogan v. Kurtz*, 94 U. S. 773, 778; and the constitution of the State of Ohio, by which only citizens of the United States are entitled to vote, or to hold office.

2. That the allegation that B's father did, prior to 1854, complete his naturalization under the laws of the United States necessarily implied that he had been duly naturalized before a court as required by those laws, and, together with the other allegations in connection with which it was made, would, if traversed, have warranted a jury in inferring that B's father became a citizen of the United States before October, 1854, and consequently that B. himself was likewise a citizen; and that for this reason, without regard to any other question argued in the case, B. was entitled to judgment on the demurrer.

*Boyd v. Thayer* (1892), 143 U. S. 135.

Evidence that a man had lived in the United States for forty years, that he voted for twenty-five years, and that a person of his name had been naturalized is sufficient to show that he was a naturalized citizen. (*Ryan v. Egan*, 156 Ill. 224, 40 N. E. 827.)

That decedent, an alien by birth, came to the United States in 1865 and lived here until his death in 1899, during which time he participated in national and State elections, and at his death held a liquor-tax certificate, which could lawfully be issued only to a citizen, is sufficient to show *prima facie* that he had been in fact naturalized and was a citizen at his death. (*Fay v. Taylor*, 63 N. Y. S. 572, 31 Misc. Rep. 32.)

A man who came to this country with his father when a child; whose father, since dead, told him he was naturalized, and voted as a citizen; who has himself exercised the rights of a citizen in the parish without question for thirty years, is not to be declared disqualified as



a grand juror because he can not procure his father's naturalization papers, and, owing to his father's residence in several States, does not know where to find the judicial record thereof. (*State v. Guilory* (La.), 10 So. 761.)

See, also, *Cowan v. Prowse* (Ky.), 19 S. W. 407; *Kadlec v. Pavik*, 9 N. D. 278, 83 N. W. 5.

Where it is alleged that a record of naturalization has been burnt or otherwise destroyed, the Department of State leaves it to the courts to hear the evidence of such loss and remedy it.

*Practice of Department of State.*

Mr. Bayard, Sec. of State, to Mr. Ferguson, Feb. 2, 1887, 163 MS. Dom. Let. 21.

"The proper course for a person seeking to establish his naturalization by other than the ordinary proofs is to resort to the judicial branch of the Government, which is charged with the duty of naturalizing aliens, and which is invested with appropriate powers for investigating and determining matters of fact which are essential to the decision of the question of acquired citizenship."

Mr. Blaine, Sec. of State, to Messrs. Birdseye, Cloyd & Bayliss, May 9, 1889, 173 MS. Dom. Let. 16. See, also, same to same, June 22, 1889, id. 432.

Mr. Blaine, Sec. of State, to Mr. Townsend, February 18, 1890, 176 MS. Dom. Let. 443; Mr. Adee, Second Assist. Sec. of State, to Mr. Emanuel, April 5, 1889, 172 MS. Dom. Let. 387.

In the case of *Campbell v. Gordon*, 6 Cranch, 176, there was a certificate of naturalization to prove citizenship. (Mr. Blaine, Sec. of State, to Mr. Pope, April 29, 1890, 177 MS. Dom. Let. 358.)

"It has always been held to be beyond the power of the Department to pronounce a judgment that a person is a citizen of the United States by naturalization in the absence of judicial proof of the fact. The records of the Department do not disclose a single case in which, where this question was involved, the Secretary of State did not decline on the ground of lack of authority to take up the question of naturalization independently of the judicial records. The Department acts upon the judgment of the courts, which exercise jurisdiction in such matters and are invested by law with appropriate powers for that purpose."

Mr. Blaine, Sec. of State, to Mr. Pennypacker, June 20, 1890, 178 MS. Dom. Let. 95.

In the case of a widow, who was abroad, and desired a passport, but was unable to produce as evidence of her citizenship the certificate of naturalization of her late husband, it being stated that the document had been lost, the Department of State said: "The sufficiency of the

secondary evidence of her citizenship must be determined by the diplomatic officer to whom she may apply for a passport, but, when it is clearly shown that the certificate of naturalization or a certified copy thereof cannot be procured, the Department accepts secondary evidence the nature of which is governed by the circumstances surrounding each case."

Mr. Olney, Sec. of State, to Mr. Brice, Dec. 9, 1896, 214 MS. Dom. Let. 659. With reference to the case of certain persons who asked for intervention in respect of the seizure of a vessel, and who claimed citizenship through the naturalization of their fathers, Mr. Olney said: "Record evidence of the naturalization of their fathers is of course the best evidence, but is not the only evidence admissible. If you can prove by the testimony of witnesses who know the fact that their fathers were naturalized, such evidence will be received and considered. Evidence that their fathers exercised the rights of citizenship, however, is another thing. What is wanted is secondary proof of the facts of naturalization." (Mr. Olney, Sec. of State, to Mr. Finney, April 14, 1896, 209 MS. Dom. Let. 347.)

### 3. IMPEACHMENT OF NATURALIZATION.

#### (1) RULES OF MUNICIPAL COURTS.

#### § 422.

The decree or order of naturalization cannot be impeached collaterally.

Campbell v. Gordon, 6 Cranch, 176; Spratt v. Spratt, 4 Pet. 393; The Acorn, 2 Abb. (U. S.) 434; United States v. Gleason, 78 Fed. Rep. 396; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Andres v. Circuit Judge, 77 Mich. 85; State v. MacDonald, 24 Minn. 48; In re Fadden, 3 Lack. Leg. N. 74; Williams, At. Gen., 1874, 14 Op. 509.

The record must show, however, that the necessary proceedings were taken. (Matter of Desty, 8 Abb. (N. Y.) N. Cas. 250; Green v. Salas, 31 Fed. Rep. 106, and cases cited.) But its efficacy is not impaired by inaccurate recitals (In re McCopplin, 5 Sawyer, C. C. 630; In re Coleman, 15 Blatch. 406); and it may be amended *nunc pro tunc* to correct clerical errors. (State v. Macdonald, 24 Minn. 48.) But the power to amend does not include the power to create a record. (Gagnon v. United States (1904), 193 U. S. 451. See *supra*, § 420.)

A judgment of naturalization, void on its face, may be collaterally attacked in a subsequent proceeding by the alien to be admitted to practice as an attorney.

In re Yamashita (1902), 30 Wash. 234, 70 Pac. Rep. 482. See *supra*, § 383.

Provision is made for the criminal prosecution of false personation, false swearing, and forgery in naturalization proceedings, as well as of the uttering, selling, and use of false naturalization papers.

Rev. Stat. §§ 5395, 5424-5429; *United States v. Lehman*, 39 Fed. Rep. 768; *United States v. Ragazzini*, 50 Fed. Rep. 923; *United States v. Tynen*, 11 Wall. 88; *United States v. Grottkau*, 30 Fed. Rep. 672, citing *State v. Helle*, 2 Hill (S. C.), 200.

§ 5424, R. S., does not render punishable the uttering of a forged naturalization certificate by a person other than the person applying for such certificate or appearing as a witness for the person so applying.

*United States v. York* (1904), 131 Fed. Rep. 323.

An individual cannot maintain an action to set aside a naturalization on the ground that it was procured by fraud, the wrong being to the State and not to the individual.

*McCarran v. Cooper*, 162 N. Y. 654, 57 N. E. 1116; *McCarran v. Cooper*, 44 N. Y. S. 695, 16 App. Div. 311; *In re McCarran*, 20 N. Y. S. 582, 31 Abb. N. C. 416, 8 Misc. 482; *Pintsch Co. v. Bergin*, 84 Fed. Rep. 140.

"The vacation by judicial decrees of fraudulent certificates of naturalization, upon bills in equity filed by the Attorney-General in the circuit court of the United States, is a new application of a familiar equity jurisdiction. Nearly one hundred such decrees have been taken during the year, the evidence disclosing that a very large number of fraudulent certificates of naturalization have been issued."

President Harrison, annual message, Dec. 1, 1890. See *In re McCoplin*, 5 Sawyer C. C. 630; *United States v. Norsch*, 42 Fed. Rep. 417; *Pintsch Co. v. Bergin*, 84 Fed. Rep. 140; *United States v. Kormmehl*, 89 Fed. Rep. 10; *In re Shaw*, 2 Pa. Dist. Rep. 250.

It was held, however, in 1898, by Judges Lacombe and Shipman, Judge Wallace dissenting, in a similar suit by the United States, on the strength of *United States v. Throckmorton*, 98 U. S. 61, 66, that the naturalization would not be set aside solely on the ground that it was procured by the perjured testimony of the person to whom it was granted. (*United States v. Gleason*, 62 U. S. App. 311.) But it may be doubted whether the rule, as laid down in *United States v. Throckmorton*, as to the determination of litigated issues by a judgment *inter partes*, is applicable to the so-called judgment in a naturalization proceeding. The principle of *res judicata* appears to be theoretically inapplicable to a decree of naturalization, which is in no wise a judgment terminating a preexisting controversy, but which is, on the contrary, the basis of constant and repeated future claims on the part of the beneficiary to the rights and privileges of citizenship and the protective action of the Government. See *infra*, p. 502.

It has lately been held by a Texas court that that State has not sufficient interest, in the legal sense, to qualify it to bring an action to set aside a fraudulent decree of naturalization in a State court. (*Petersen v. The State*, Court of Civil Appeals, June 27, 1905, 89 S. W. 81.) It is a fact, however, that the citizenship gained by naturalization qualifies the individual to vote at elections in the State and to

hold the most important public offices. It is stated, in the opinion of the court, that the decision was made without an examination of the authorities, for which there appeared at the moment to be no opportunity.

Certificates of naturalization granted to Chinese against the prohibition of the act of 1882 have been treated as void.

In re Hong Yen Chang, 84 Cal. 163, 24 Pac. Rep. 156; In re Gee Hop, 71 Fed. Rep. 274; McKenna, At. Gen., 1897, 21 Op. 581; Mr. Blaine, Sec. of State, to Mr. Rockwell, Dec. 12, 1890, 180 MS. Dom. Let. 157; Mr. Foster, Sec. of State, to Mr. Long, July 18, 1892, 187 MS. Dom. Let. 277; Mr. Gresham, Sec. of State, to Mr. Helm, Aug. 30, 1893, 193 MS. Dom. Let. 287.

(2) RULE OF INTERNATIONAL ACTION.

§ 423.

The Department of State possesses no power to vacate decrees of naturalization; but it exercises, under the direction of the President, plenary jurisdiction over the conduct of foreign relations. In the exercise of this jurisdiction, the Department, as has often been held, will, so far as any action of its own is concerned, treat as invalid a certificate of naturalization that has been improperly obtained.

The grounds on which the Executive so acts have perhaps never been stated more concisely, nor yet with greater clearness and profundity of reasoning, than by the Commander Bertinatti, as umpire of the Costa Rican Commission, 3 Moore, Int. Arbitrations, 2586-2589.

C. was admitted to citizenship by the superior court of New York Dec. 29, 1853, and on the strength of his certificate he obtained from the Department of State a passport and went to Prussia. A question having arisen with regard to him, the legation in Berlin reported that he did not emigrate to the United States till 1851. On inquiry of the court, the Department of State learned that he was naturalized under the act of May 26, 1824, requiring a five years' residence. On these facts, the legation was instructed that C. was "not entitled to protection as an American citizen," and that he should be required to surrender his passport.

**Cases, 1854-1881.**

Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 10, May 23, 1854, MS. Inst. Prussia, XIV. 215; same to Mr. Lynch, clerk of the Superior Court of New York, May 18, 1854, 42 MS. Dom. Let. 452.

See, as to a case in Turkey, Mr. Trescot, Assist. Sec. of State, to Mr. Miller, Sept. 25, 1860, 53 MS. Dom. Let. 126. See, also, Mr. Seward, Sec. of State, to Mr. Hall, July 17, 1867, 76 MS. Dom. Let. 485.

"The record of naturalization ought certainly to be received as *prima facie* evidence of the facts which it recites. It is not, however, conclusive. Upon this point I give, for your information and guidance, the following extract from an opinion of the Attorney-General, under date of January 21, 1871, upon the case of a naturalized citizen of German birth, submitted to this Department by our minister at Berlin:

"He was naturalized in the United States district court for Connecticut on the 27th day of March, 1869. The record recites that he had resided constantly in the United States for more than five years. If this recitation were conclusive, his right to protection under the treaty would be established. The record establishes the general fact of his naturalization and of his right to be recognized here as an American citizen in all domestic transactions. But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party, and stands in privity with no party, to these proceedings; and it is not in the power of Mr. Stern by erroneous recitations in *ex parte* proceedings to conclude the Government as to matters of fact."

Mr. Fish, Sec. of State, to Mr. Wing, min. to Ecuador, April 6, 1871, MS. Inst. Ecuador, I. 263. Mr. Fish added that in the case above referred to "the evidence impeaching the recitals in the record of naturalization was derived by Mr. Bancroft from the deliberate admissions of the party himself, corroborated by the statements of others cognizant of the fact."

For the opinion cited, see Akerman, At. Gen., 1871, 13 Op. 376. See Williams, At. Gen., 14 Op. 154.

Naturalization in the United States, without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities to which, without it, he would be subject, ought to be treated by this Government as fraudulent. (Williams, At. Gen., 1873, 14 Op. 295.)

Dec. 31, 1874, Mr. Schlözer, German minister at Washington, enclosed to the Department of State the certificates of naturalization of two former subjects of Prussia, dated, respectively, Jan. 12 and Feb. 13, 1871. Mr. Schlözer stated that both the persons in question returned to Prussia in 1871, and that it was shown by their admissions, which had been confirmed by an official inquiry, that they left Prussia, the one in May, 1866, and the other in 1867; and he therefore inquired (1) whether their certificates were valid under the laws of the United States, and (2) whether on the strength of those documents the persons named in them were recognized by the United States as American citizens. Mr. Fish replied: "Under the circumstances, and in the case you state, certificates of naturalization, valid

on their face and founded on the decree of a competent court, cannot be questioned except through judicial proceedings instituted for the purpose, or in which the correctness of the facts formerly passed upon may properly be adjudicated, and that it is not within the province of the political department of the Government to anticipate what would be the result of a judicial inquiry into the question."

Mr. Fish, Sec. of State, to Mr. Schlözer, Jan. 8, 1875, For. Rel. 1875, I. 577.

By an investigation, conducted under the direction of the American consul at Smyrna, it appeared that one M. N., a native Turk, who had been residing in Turkey since August, 1875, with a certificate of naturalization as a citizen of the United States, first went to America in 1872, leaving his family behind him, and that he returned to his home a few months later, but went again to America in June, 1873. His certificate of naturalization bore date Aug. 26, 1874, and was granted by the United States district court at Boston. By a copy of the proceedings in the court, it appeared that M. N. swore that he was a Greek subject, and that he came to the United States in 1851, being then a minor under eighteen years of age. Two witnesses vouched for him, but neither his name nor those of his vouchers appeared in the Boston directory for 1873, 1874, or 1875. On these facts, Mr. Fish said:

"Upon his presentation of the ordinary certificate of naturalization to you and with your knowledge of the decisions of the tribunals of the United States as to the force and effect of such judicial proceedings, you hesitate to entertain any suggestion from the authorities of the Ottoman Government bringing in question the conclusiveness of the judicial acts of the tribunals of the United States or the validity of Mr. M—— N——'s claim to citizenship under those proceedings, and properly remit the determination of the question to the Department.

"The Supreme Court of the United States has decided in several cases in which the question has been collaterally before it that the decree of a competent court being in due form is to be held as conclusive evidence of the legal naturalization of the party, and the Attorney General who is the legal adviser of the Executive branch of the Government following the doctrine of these judicial decisions holds that such decrees of naturalization have the force and effect of a judgment.

"The doctrine thus judicially promulgated is not a new one. All judgments of a competent court in the United States, are taken and accepted as a verity, and a decree of naturalization as to all questions which may be affected by it within the United States and while the party is subject to the jurisdiction of the United States carries

with it the same force and effect. The party holding it may take, hold, and transmit property, may hold office either by election or appointment, in short may exercise all the rights and enjoy all the privileges that pertain to the character of a citizen.

"It is at the same time not to be doubted but that a decree of naturalization like any other judgment may be impeached for fraud in its procurement by a direct and proper judicial proceeding instituted for that purpose, and it is equally incontrovertible that the party to such decree who may have been guilty of fraud in the procurement and all persons aiding and abetting him in such purpose are liable to be proceeded against criminally and punished under the laws of the United States, and if the decree of naturalization should be found to have been procured by fraud, it would as in the case of any other judgment thus corruptly obtained be set aside and held for naught.

"With the facts now in possession of the Department in regard to the naturalization of Mr. M—— N——, it is difficult if not impossible to resist the conclusion that his pretended naturalization is the result of a deliberate and preconcerted fraud on his part. He is now without the jurisdiction of the United States where its judicial process cannot reach him. It cannot be that a fraudulently obtained decree of a court, which would be set aside if the process of the court could reach and bring within its jurisdiction the party holding it, is to be considered conclusive upon this Government merely because the party has placed himself without its jurisdiction, and is availing himself of the first fraud to practice another. It is the Executive Department of the Government to which, in this case, he appeals. The Executive Department of the Government must therefore see that the good name and good faith of the Government be not compromised by sustaining a claim resting on fraud and falsehood, and which the courts would set aside, could the case be brought within their jurisdiction. While the Executive Department bows with deference to the decrees of the Judicial Department of the Government within the limits of their reach, it is not bound to claim for these decrees in foreign countries, where manifestly obtained by fraud or perjury, a validity which might not be conceded, and which could neither be enforced nor defended on the ground of truth, or justice or equity. I cannot doubt the evidence that N—— was a resident of Calymno until the year 1872, that he occupied an official position in that island inconsistent with other than alien citizenship during the years 1871, 1872, that his claim to have come to the United States in 1851 when under the age of 18 and to have resided here continuously from that time is untrue, or that his naturalization certificate was fraudulently obtained.

"He has now returned to his native country, and is attempting to shield himself under the nominal character of a citizen of the United States, thus fraudulently acquired, from the obligation of answering to the laws of his own country, and in pursuance of this purpose he invokes the protection and aid of the United States.

"To comply with his request, in the face of these established facts, would be in my estimation no less than lending the sanction of this Government to the attainment of an inequitable and fraudulent end, and would be alike inconsistent with its established policy and contrary to its known practice, an act which could not be expected to meet with the approval of the President.

"You will therefore without any expression of opinion to the Ottoman Government as to the validity or otherwise of the naturalization in question, give Mr. M. — N. — to understand that, while the Department does not at this time determine, conclusively, the question of the validity of his naturalization and his claim to citizenship consequent thereon, the protection of this Government must be denied to him until he shall have succeeded by proper steps and satisfactory evidence in removing the presumption of fraud in the procurement of that naturalization which the facts and circumstances as now known to the Department plainly give rise to, and should he desire your advice as to the proper measures to be adopted by him towards that end, you will give such counsel and advice as may in your judgment tend to facilitate his efforts in such purpose."

Mr. Fish, Sec. of State, to Mr. Maynard, min. to Turkey, No. 40, Feb. 11, 1876, MS. Inst. Turkey, III. 163.

See, also, Mr. Cadwalader, Act. Sec. of State, to Mr. Davis, min. to Germany, Aug. 11, 1875, MS. Inst. Germany, XVI. 91.

"While the decisions concerning the binding force of a record of naturalization make it difficult to go behind the record; at the same time, whenever the Government is called upon for its interposition in a foreign state on behalf of any person claiming to be a naturalized citizen, the question whether, under all the facts presented by him, intervention should be accorded is always open for consideration."

Mr. Fish, Sec. of State, to Mr. Moran, Feb. 16, 1877, MS. Inst. Portugal, XV. 156.

"It appears that you obtained the decree of naturalization . . . when you had not resided five years immediately preceding the rendition of such decree; consequently such decree of naturalization cannot be considered valid." (Mr. Hunter, Act. Sec. of State, to Mr. Trujillo, Sept. 29, 1876, 115 MS. Dom. Let. 351.)

"The matter [of fraudulent naturalization] has become a source of great trouble to certain of the diplomatic officers of this Government, as well as to this Department." (Mr. Fish, Sec. of State, to Attorney-General Taft, Feb. 13, 1877, 117 MS. Dom. Let. 701.)



The legation at Berlin declined to issue a passport to a naturalized citizen on the ground that he had resided in the United States only three years. It appeared by the proceedings in which he was naturalized that it was represented to the court that he had resided in the United States five years. On these facts Mr. Evarts declared "that his certificate of naturalization was obtained on fraudulent and false affidavits and is therefore void;" that he was "not a citizen of the United States," and was "not entitled to a passport." The thanks of the Department were expressed to the legation for its "prudence and caution."

Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, No. 55, Dec. 10, 1879, MS. Inst. Germany, XVI. 520.

The question as to impeachment of naturalization was at one time much discussed in the course of the proceedings of the **Question before the Spanish Claims Commission.** Spanish Claims Commission under the agreement between the United States and Spain of February 12, 1871. By that agreement it was stipulated that no judgment of a Spanish tribunal disallowing the affirmation of a party that he was a citizen of the United States should prevent the arbitrators from hearing a claim presented in his behalf by the Government of the United States, but that in any case before the arbitrators the Spanish Government might "traverse the allegation of American citizenship," and that thereupon "competent and sufficient proof thereof" would be "required;" and that "the Commission having recognized the quality of American citizens in the claimants they will acquire the rights accorded them by the present stipulations as such citizens."

In the case of Ortega, No. 91, it appearing by the claimant's own statements that he had not complied with the condition of residence under the naturalization laws, the umpire, M. Bartholdi, held that his naturalization was invalid and that he was not entitled to appear as an American citizen.

The agent of the United States, Mr. Durant, March 7, 1879, invoked the interposition of the Department of State in respect of the question thus decided, the same question being involved in other pending cases. Mr. Evarts, who was then Secretary of State, replied, in a letter bearing the same date, that the Department was of opinion that the powers of the Commission for the determination of disputed cases of citizenship were not "judicial," and that when the advocate for Spain had traversed "the fact of naturalization," and the naturalization was shown "by judicial proof," and it "being established that the party has done nothing since to forfeit his acquired right," the limit of the "discretionary power" of the Commission "would seem to be reached."

When this reply was written M. Bartholdi had been succeeded as umpire by Baron Blanc, before whom there was pending the case of Fernando Dominguez, No. 32. In this case Spain alleged that the naturalization was fraudulent, chiefly on the ground that the claimant had spent in Cuba the greater part of the five years immediately preceding his admission to citizenship. Baron Blanc held that it was the duty of the umpire to determine on the papers submitted to him whether the certificate of naturalization was procured by fraud or was granted in violation of treaty stipulations or of the rules of international law, but he also held that the claimant had previously to his naturalization been domiciled in the United States, and that such absences as were shown did not "work a change of legal residence;" and, assuming that the court had taken this view, Baron Blanc said that it must prevail so long as it remained "unreversed by an American tribunal of superior jurisdiction."

The arbitrator for Spain dissented from this conclusion, declaring that he could not agree to refer to the umpire any case in which the question of citizenship was involved till he should have submitted the subject to his Government, in order that it might determine in conjunction with the United States the exact scope of Spain's right to "traverse" an allegation of American citizenship. February 9, 1880, the subject was brought to the attention of the Department of State by the Spanish minister at Washington. In his reply, dated March 4, 1880, Mr. Evarts declared that it was the view of the United States that the Commission, under the agreement of 1871, was an "independent judicial tribunal," possessing competency "to bring under judgment the decisions of the local courts of both nations;" that in no case had the right been denied to Spain to support her traverse of the allegation of American citizenship by showing that the proofs adduced thereof "were on their face inadmissible, or that they were unworthy of credit because of a taint of fraud in the proceedings of naturalization from which the documents emanated, or that, taken together, such proofs were insufficient to establish the demand of American citizenship put forth by this Government on behalf of the claimant." Mr. Evarts further declared that, if the decision of the umpire had been that the claimant had never in fact acquired American citizenship, the United States would have felt bound to accept the decision as final and conclusive.

• May 4, 1880, the Spanish minister informed Mr. Evarts that, as the result of the latter's note of the 4th of March, a "perfect conformity" existed between the views of the two governments.

The question thus apparently settled was, however, soon revived. In April, 1880, Baron Blanc, being on the point of leaving the United States for an indefinite time, resigned. He was succeeded as umpire

by Count Lewenhaupt, then Swedish minister at Washington. In the following autumn the discussion of the question of naturalization was revived before the Commission by extended arguments of counsel on the part of the respective governments, and on April 18, 1881, Count Lewenhaupt in the case of Buzzi, No. 22, decided that the claimant had no right to appear as an American citizen, since it was shown that during the five years immediately preceding his naturalization he had lived about four and a half years in Cuba.

On the following day Mr. Durant brought this decision to the notice of the Department of State, of which Mr. Blaine had succeeded Mr. Evarts as the head. On the 22nd of April Mr. Blaine wrote to Mr. Durant concurring in the suggestion of the latter that a motion should be made before the umpire for a rehearing. November 30, 1881, however, Mr. Blaine withdrew this instruction, and directed Mr. Durant to inform the Commission that the United States could not accept the judgment in the case of Buzzi as being "within the competence of the umpire to render," and he added: "For the present it is sufficient that I refuse to recognize the power of the Commission to denationalize an American citizen. When a court of competent jurisdiction, administering the law of the land, issued its regular certificate of naturalization to Pedro Buzzi, he was made a citizen of the United States, and no power resides in the Executive Department of this government to reverse or review that judgment. And what the power of the Executive can not do in itself it can not delegate to a commission, which is the mere creation of an executive agreement," as was that of 1871. Mr. Durant was therefore instructed not to have any case referred to the umpire wherein the question in Buzzi's case was involved. Under this instruction Mr. Durant suspended action in some fifteen cases.

February 17, 1882, Mr. Frelinghuysen, who was then Secretary of State, instructed Mr. Suydam, who had succeeded Mr. Durant as advocate for the United States, to press the business before the arbitrators, and whenever he found them disagreeing, and in his judgment the disagreement opened a controverted question of citizenship to the decision of the umpire, to report to the Department. September 25, 1882, when the Commission, after a recess, was about to reconvene, Mr. Frelinghuysen addressed a further instruction to Mr. Suydam in which he stated that the Department must insist: (1) That it possessed no power and had conferred none on the Commission to examine into "the motive, the purpose, and object of the applicant in seeking naturalization:" (2) that the Department possessed no power and had conferred none on the Commission to make it requisite that a naturalized citizen should have been "actually present" in the United States for five years immediately preceding

naturalization, since a "residence" might "exist without an uninterrupted actual presence during the whole probationary period;" (3) that the Government of the United States could "not deny that, under the terms of the agreement, the certificate of naturalization may be proven to have been obtained fraudulently;" and (4) that the "true rule" to govern the Commission was that when the allegation of naturalization was traversed and the naturalization was "established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, it can only be impeached by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law."

December 14, 1882, Mr. Lowndes, then arbitrator for the United States, and the Marquis de Potestad, arbitrator for Spain, announced an agreement between them in the very terms in which Mr. Frelinghuysen had expressed the "true rule" by which the Commission should be governed; and they added that they would transmit these rules to the umpire, in order that he might be guided by them in the cases yet to be decided by him.

Moore, *Int. Arbitrations*, III. 2590-2621.

Subsequently the following decisions were rendered: In the case of J. G. de Angarica, No. 17, Mr. Lowndes, December 26, 1882, with the concurrence of the arbitrator from Spain, dismissed the claim on the ground that the claimant, who appeared as a naturalized citizen, had not resided in the United States during the five years preceding his naturalization.

A similar decision was rendered by Mr. Lowndes on the same day in the case of R. F. Criado y Gomez, No. 29.

These two decisions may be found in Moore, *Int. Arbitrations*, III. 2621, 2624.

For other decisions in similar cases, see *id.* 2626-2647.

By the French and American Claims Commission, under the convention of January 15, 1880, claims of naturalization were rejected on the ground that the certificate was obtained by misrepresentation of material facts, as well as on the ground that the conditions of residence were not complied with. (Moore, *Int. Arbitrations*, III. 2647-2653.)

S. invoked the interposition of the legation of the United States in Berlin. It appeared that he emigrated to America in December, 1871, being then nineteen years old, and arrived in New York in January, 1872. He was naturalized Oct. 2, 1876, and in the same month returned to Germany. He stated,

Cases since 1881.

in response to inquiries, that his final papers were issued to him by the court voluntarily, and that he did not employ any attorney, pay any bribe, or use any improper means to secure his naturalization in advance of the proper time. On these facts Mr. Blaine said: "On Mr. S——'s own showing he was admitted to citizenship contrary to the laws of the United States, and the decree of the court admitting him is therefore a nullity. The court was misled and deceived by the testimony of his witnesses. He knew the facts and must be presumed to have known the law. Under the circumstances it was Mr. S——'s duty to have brought these facts to the knowledge of the court. It is not a question of merely honest intention. The circumstance, moreover, that Mr. S——, immediately after obtaining his certificate of naturalization, returned to his native country, does not tend to impress me with a strong sense of the *bona fides* of his case. This Government can not properly interfere in his behalf. Your course in the matter is approved."

Mr. Blaine, Sec. of State, to Mr. Everett, chargé at Berlin, No. 265, Oct. 10, 1881, MS. Inst. Germany, XVII. 125, acknowledging the receipt of Mr. Everett's No. 248, Sept. 3, 1881, 29 MS. Desp. Germany.

A. F. Pinzon applied to the United States legation at Bogotá for its intervention, in order that he might be exempt from the duties of Colombian citizenship. He was a native of Colombia, but produced a certificate of naturalization as a citizen of the United States. In reply to inquiries of the legation, however, he stated that he had lived in the United States but four years; that he had never made any declaration of intention; that when naturalized he was not required to prove that he had lived at least five years in the United States; that, immediately on obtaining his certificate, he returned to Colombia, and that he had not since been in the United States and had no intention of returning thither to reside. The Department of State held that he was not entitled to protection, "his certificate of naturalization having been admittedly obtained in fraud of the United States statutes."

Mr. Bayard, Sec. of State, to Mr. Scruggs, min. to Colombia, May 16, 1885, For. Rel. 1885, 211. See Mr. Scruggs's dispatch of Dec. 26, 1884, id. 199.

See, to the same effect, Mr. Bayard, Sec. of State, to Mr. Cramer, No. 138, May 6, 1885, MS. Inst. Switzerland, II. 251; to Mr. Winchester, No. 33, Dec. 28, 1885, id. 295; to Mr. Sterne, April 20, 1886, 159 MS. Dom. Let. 674.

See, also, Mr. Bayard, Sec. of State, to Mr. Francis, min. to Aust.-Hung., May 20, 1885, For. Rel. 1885, 27; to Mr. Coleman, No. 386, Dec. 4, 1888, MS. Inst. Germany, XVIII. 174.

K. applied to the American legation in Berne for a passport. His application showed that he arrived in New York May 21, 1873, and

was naturalized October 23, 1877, when he had resided in the United States only four years and five months. He admitted that the facts were as stated, but claimed that he was misinformed as to the law, and that the court which admitted him to citizenship did not ask him any questions. The legation declined to issue a passport, and its decision was approved.

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Oct. 7, 1887, For. Rel. 1887, 1072.

A passport having been issued to a person, as a naturalized citizen, in the name of Stephen Emil Heidenheimer, he subsequently admitted his identity with "Edward Heidenheimer," who, as appeared by the passenger list of the steamer *Australasian*, arrived in the United States on November 1, 1866, only four years and six months prior to his admission to citizenship. He declared, however, that the name in the passenger list was erroneous; that when he applied to the court for naturalization, it was with a view to go to Germany temporarily, on account of his health; that he had no intention of defrauding or misleading the court, but that he was unable to state, after the lapse of time, whether he acted in ignorance of the law or under a mistake as to the date of his arrival. Whatever the cause may have been, whether ignorance of the law or mistake as to the facts, he attributed it to his illness in 1870 and 1871. The Department of State held, however, that under the law (sec. 2170, R. S.) the duty of the courts was imperative, admitting of no exercise of discretion; that the question whether the false statement as to five years' residence was made ignorantly or not was immaterial, since innocent intent could not confer jurisdiction upon the court to grant naturalization in violation of law; that the applicant consequently was not a citizen of the United States and was not entitled to a passport or other certificate as such, and that his passport should be cancelled.

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Dec. 8, 1888, For. Rel. 1888, I. 565.

Mr. Bayard added: "You will cancel the passport heretofore issued by you to Mr. Heidenheimer, and you will return hither the passport issued to him in 1871 by this Department."

A. L. obtained from the superior court of the city of New York a certificate of naturalization October 24, 1888, and, securing a passport from the Department of State, went to Palestine. By the record of the naturalization proceedings, it seemed that he had represented himself as a native of Russia and as having resided in the United States in 1880; and from his passport application it was inferred that, in order to bring himself within R. S., § 2167, and thus avoid the production of a previous declaration of intention, he had represented

himself, when he was naturalized, as having come to the United States while a minor. In 1890 A. L., who was then residing in Palestine, invoked the protection of the United States consul at Jerusalem in respect of a complaint against the cavass of the British consulate. The consul reported that A. L. was, in fact, a native of Palestine; that he was five years older than was stated in his passport application; that he was a protégé of the British consulate down to August, 1884; that he was, to the consul's knowledge, residing in Palestine in 1886, and that he had at length admitted that he left for the United States in November, 1887, less than a year before he was naturalized. Mr. Blaine said: "L—— is not now within the jurisdiction where he committed the illegal acts which the evidence discloses, and can not be reached by the process of our courts. The only course open to this Government, therefore, is to refuse to recognize his claim to its protection."

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 141, Dec. 17, 1890, MS. Inst. Turkey, V. 171.

In the similar case of a native of Italy, who had been naturalized apparently after a two years' residence, and who, after his return to Italy, invoked the protection of the American legation, Mr. Blaine said: "There is no doubt that his naturalization was procured by fraud, and that the passport he holds was improvidently issued. It should, if possible, be surrendered and cancelled; but, if that can not be done, you will refuse any further intervention in P——'s behalf." In saying that the passport was "improvidently issued," Mr. Blaine referred to the circumstance that P. stated in his passport application that he emigrated in August, 1868, and was naturalized in 1870. (Mr. Blaine, Sec. of State, to Mr. Porter, min. to Italy, No. 123, April 1, 1891, MS. Inst. Italy, II. 510.)

It being stated in a passport application that the applicant arrived in the United States Dec. 18, 1880, and it appearing that his naturalization was granted April 1, 1885, the Department of State refused to issue a passport. (Mr. Wharton, Act. Sec. of State, to Mr. Schuftz, Jan. 8, 1892, 184 MS. Dom. Let. 615.)

M., a native of Germany, arrived in the United States in May, 1874. He was naturalized by the court of common pleas, in Philadelphia, in October, 1876, under sec. 2167, R. S., on averment that he came to the United States in his eighteenth year and had resided there 11 years. The action of the American embassy in Berlin in refusing to grant him a passport was approved.

Mr. Gresham, Sec. of State, to Mr. Runyon, amb. to Germany, No. 189, Dec. 15, 1894, MS. Inst. Germany, XIX. 171.

"It is the practice of the Department to refuse to issue a passport in case it appears upon the face of the papers [in this instance a passport application and certificate of naturalization] that naturalization was obtained by fraud."

Mr. Olney, Sec. of State, to clerk of common pleas, New York City, Jan. 13, 1897, 215 MS. Dom. Let. 202.

"Naturalization after a residence of less than the lawful period can only be presumed to have been decreed by the court in ignorance of the facts, or by imposition upon it and a false declaration under oath as to the time of residence and the other statutory conditions of naturalization. A certificate of naturalization so obtained is not regarded as binding upon this Department, as it would be equally not binding upon the German Government under the naturalization treaty."

Mr. Day, Assist. Sec. of State, to Mr. Stewart, Nov. 11, 1897, 222 MS. Dom. Let. 359.

Where the validity of naturalization is in doubt, the presumption is "in favor of the rights and privileges of the citizen."   
 **Presumption in doubtful cases.**

Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Dec. 20, 1875, MS. Inst. Germany, XVI. 133.

To the same effect, Mr. Rockhill, Act. Sec. of State, to Prince Wrede, Aug. 7, 1896, MS. Notes to Aust. Leg. IX. 273.

"Under ordinary circumstances, where a *prima facie* record of citizenship, both of the father and the son, appears in the archives of the legation, untraversed by any adverse allegation, and where no motive of deception and fraud is apparent, the Department would be adverse to throwing on the applicant the perhaps needless and inconvenient burden of proving that the father actually and legitimately acquired the status of a citizen of the United States."

Mr. Frellinghuysen, Sec. of State, to Mr. Langston, Aug. 13, 1883, MS. Inst. Hayti, II. 353.

(3) AUTHORITY TO MAKE DECISION.

§ 424.

The question of the validity of naturalization in the United States cannot be determined *ex parte* by a foreign government, but should be presented to the government of the United States.

Mr. Fish, Sec. of State, to Mr. Nelson, min. to Mexico, Feb. 13, 1872, For. Rel. 1872, 387.

An American decree of naturalization "is not open to impeachment by the French Government, either in its executive or its judicial branch," and "if it is alleged to have been improvidently issued the remedy is by application to this Department."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Feb. 15, 1888, For. Rel. 1888, I. 510.



"This Department has, therefore, acting upon well-settled principles of law, uniformly declined to admit the right of any foreign power to question the validity of such judgment [of naturalization].

"But, at the same time, this Government will in all proper cases itself inquire into the regularity of any judgment of naturalization that may be impeached. And proofs touching the identity of the person, or showing that the judgment was obtained by fraud or granted improvidently, will receive the careful attention of this Department upon being presented by your Government."

Mr. Bayard, Sec. of State, to Mr. Bluhdorn, Aug. 21, 1888, MS. Notes to Austrian Leg., VIII. 575.

"It is proper, however, to advert to a circumstance which in this case, as in others heretofore, especially attracts the Department's attention. Upon arrest, the citizen papers of the accused are taken away, and he is thus deprived of the means of proving his citizenship before the legation of his country, to which he has an indisputable right to appeal for protection. You have very properly invited Count Kalnoky's consideration of the anomaly of seizing the identification papers of a citizen of a friendly power, and holding him to prove his foreign citizenship, which it has been made impossible for him to prove. Besides this, great delays have often occurred in past instances through this needless obstruction of the legation's right to promptly intervene to establish the rights of the citizen. Frequent cases of such hardship are of recent record in your legation. You should intimate to the minister of foreign affairs the confident expectation here entertained, that it is only necessary to point out this abuse to ensure its correction, and to secure to any American citizen accused of violation of the military laws of Austria-Hungary the right of free and instant appeal to the legation for protection, and the opportunity to establish, to its satisfaction, by documentary proof, his claim for its intervention to secure his rights as a citizen under the naturalization treaty of 1870 between the two countries. In this way, moreover, the intervention of the legation in any case of unfounded or fraudulent claim to protection would be averted."

Mr. Gresham, Sec. of State, to Mr. Grant, min. to Austria-Hungary, May 8, 1893, For. Rel. 1893, 13, in relation to the case of Charles Mercy, alias Saul Moerser, a naturalized citizen of the United States, of Gallician birth, who was arrested at Krakau on a charge of evasion of military duty and of embezzlement previous to emigration. When he was arrested all his papers, including his certificate of naturalization, were taken from him. On the strength of the evidence of naturalization, the former charge was withdrawn, and he was held to bail on the charge of embezzlement, pending the disposition of which a right was asserted to hold all his papers in judicial custody. He appears to have forfeited his bond and quitted the country.

May 8, 1893, the imperial-royal minister of foreign affairs wrote to the minister of the United States: "The flight of the aforesaid individual fully proves the suspicion . . . that Saul Moerser was entertaining dishonest thoughts when he impatiently clamored for his documents of identity which were in the safe-keeping of the court, and that the authorities at Krakau were perfectly justified in refusing to hand these documents over to Saul Moerser, because they knew his true character."

In an instruction of June 1, 1893, Mr. Gresham said: "In withholding the evidence of the citizenship of Mr. Moerser, it may be observed that there is an essential distinction between withholding the papers from the individual and withholding them from the legation. By the latter course the legation is deprived of all opportunity to ascertain whether the party is in fact a citizen of the United States by lawful process and as such entitled to the protection of the legation to secure him speedy and impartial justice or to defend his rights under the treaty if infringed." (For. Rel. 1893, 14-15.)

In the case of John Benich, a native of Hungary, who was alleged to have obtained his naturalization in the United States without having resided there for five years uninterruptedly, as required by the treaty between the United States and Austria-Hungary, the Austrian Government asked that his certificate of naturalization should be cancelled; and it was suggested that the superior court of Cook County, Illinois, by whom the certificate was granted, should require Benich to show cause why it should not be cancelled. (For. Rel. 1894, 36-38.)

The minister of the United States at Vienna, who had made this suggestion, was instructed to inform the minister of foreign affairs that the Department of State had no powers by any steps of its own to cancel the certificate, but that the matter would be submitted to the court at Chicago, and that, should the court decide that its decree of naturalization was erroneously issued and set it aside, the Department would withdraw the passport which had been issued in reliance upon it. (For. Rel. 1894, 46, 47.)

The treaty of naturalization between the United States and Austria-Hungary of Sept. 20, 1870, "being a contract between equal sovereignties, stipulates that five years' residence in the territory of the one, coupled with naturalization, shall constitute full citizenship to be duly recognized and respected in the territories of the other. Naturalization is a sovereign attribute within the sole competence of the respective parties and each is competent to certify the fact under its own laws. By the laws of the United States a five years' uninterrupted residence is essential to the lawful naturalization of all aliens, save minor children of naturalized parents (such children residing within the jurisdiction of the United States) and honorably discharged soldiers, which latter may be naturalized on proving at least one year's residence.

"While in these exceptional cases the Austro-Hungarian Government may rightly require the facts, there is nothing in the treaty

which can authorize its *ex parte* municipal action to that end. It rests with the Government of the United States to certify those facts, upon request, if need be, and it is equally incumbent upon this Government to press no case where citizenship may be ascertained to have been conferred and the naturalized Austrian to have quitted the United States within the stipulated term of five years. As for the provisions of Article II., they are clearly intended to authorize the respective governments to apply the penalties in certain specific cases, and the opportunity and obligation to prove the facts necessarily rests with the government which takes advantage of the right conferred. But the facts so to be shown are wholly distinct from any question of citizenship; for the returning offender may be punished according to Austro-Hungarian law for any of the specified acts of nonfulfillment of military duty before emigration, without impugning the validity of his subsequent naturalization in conformity with the laws of the United States."

Mr. Gresham, Sec. of State, to Mr. Tripp, mln. to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 25.

This instruction related to a case in which a native of Croatia, who had been naturalized in the United States after a seven years' residence, was, while on a visit to his native country, arrested and held for military service, although his passport and certificate of naturalization were submitted, in original and translation, to the local authorities. Subsequently, on the interposition of the American legation at Vienna, he was, by order of the Hungarian minister of defense, temporarily discharged from active service, but the question of finally erasing his name from the rolls was reserved till "full information" should be received as to his United States citizenship. It was with reference to these circumstances that the foregoing instruction was written, in which Mr. Gresham maintained that United States passports were, "on their face, entitled to faith and credit" as *prima facie* evidence of citizenship, and that if the Austro-Hungarian authorities should "have reason to believe that they are fraudulently held by others than the persons to whom they were lawfully issued, or that the holders have obtained naturalization in fraud of the laws of the United States, or claim privileges of citizenship not granted by the treaty of naturalization between the two countries, the facts should at once be brought to the notice of the Government of the United States through its accredited envoy in Austria-Hungary," so that any "doubtful cases of citizenship" might be disposed of "by the cooperative action of the legation and the foreign office."

#### (4) DISPOSITION OF FRAUDULENT CERTIFICATES.

#### § 425.

"Frequent instances are brought to the attention of the Government of illegal and fraudulent naturalization, and of the unauthorized use of certificates thus improperly obtained. In some cases the

fraudulent character of the naturalization has appeared upon the face of the certificate itself; in others, examination discloses that the holder had not complied with the law; and in others, certificates have been obtained where the persons holding them not only were not entitled to be naturalized, but had not even been within the United States at the time of the pretended naturalization. Instances of each of these classes of fraud are discovered at our legations, where the certificates of naturalization are presented, either for the purpose of obtaining passports or in demanding the protection of the legation. When the fraud is apparent on the face of such certificates, they are taken up by the representatives of the Government and forwarded to the Department of State."

President Grant, annual message, Dec. 7, 1874. (For. Rel. 1874, xi.)

Following this passage, President Grant went on to urge that legislation be adopted to secure the ready cancellation of records of naturalization obtained by fraud, so that the individual, after his certificate was taken from him, might not immediately obtain a fresh duplicate from the court.

The precedents of the Department of State with regard to the treatment of the certificate of naturalization in such cases are altogether contradictory. President Grant and Mr. Fish, as is seen by the foregoing extract, refused to return to the individual the certificate which he had fraudulently obtained, evidently acting upon the principle that, as he was not entitled to protection as a citizen, he should not be permitted to carry about with him the discredited evidence of citizenship, on which he might attempt to obtain or even might obtain a passport from another legation. At other times the Department has assumed that the certificate must be returned to him, on the theory (1) that he has in it a sort of property right of which he can not be deprived, or (2) that the Executive "can not declare that the man is not a citizen." (Mr. Sherman, Sec. of State, to Mr. Draper, amb. to Italy, No. 128, March 22, 1898, MS. Inst. Italy, III. 278.) With regard to the first ground, it may be observed that the Department does not hesitate in such case to retain and cancel a passport, which the individual has obtained and for which he has paid the usual fee. As to the second ground, the answer is two-fold. In the first place, the Executive has in reality repeatedly declared that a person who has been fraudulently naturalized "is not a citizen," for any purpose of protection abroad; and, in the second place, this is all that the withholding and retention of the fraudulently obtained certificate in such case amounts to. It does not involve any assumption of power to cancel or set aside the judicial record, or to invalidate any claim of citizenship which the individual might afterwards assert in the United States. On the contrary, it merely deprives him of the means of continuing to assert a fraudulent claim to protection abroad. It seems advisable, in any event, to communicate the facts to the proper court for its information. (Mr. Gresham, Sec. of State, to Mr. Runyon, No. 189, Dec. 15, 1894, MS. Inst. Germany, XIX. 171.)

In the case of a person who was naturalized on the ground of service in the Army of the United States in the war with Spain, but who, as it appeared, had never so served, a direction was given to procure

and retain his certificate of naturalization. (Mr. Cridler, Third Assist. Sec. of State, to Mr. Donzelmann, No. 27, March 20, 1899, 166 MS. Inst. Consuls, 349.)

A person improperly naturalized is not entitled to a passport "or other certificate" of American citizenship. (Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Dec. 8, 1888, For. Rel. 1888, 1. 565.)

#### XI. DOUBLE ALLEGIANCE.

The doctrine of double allegiance, though often criticised as unphilosophical, is not an invention of jurists, but is the logical result of the concurrent operation of two different laws. In the absence of a general agreement for the exclusive application, according to circumstances, of the one or the other of such laws, the condition that actually exists is described by the term double allegiance. An undisputed example of it is furnished by the case of a child who, by reason of his parents being at the time of his birth in a foreign land, is born a citizen of two countries—a citizen of the country of his birth *jure soli*, and a citizen of his parents' country *jure sanguinis*. It is true that in such a case a double claim of allegiance potentially may not arise. For instance, the country of birth may not claim the allegiance of children born on its soil to alien parents; or the country to which the parents belong may not claim the allegiance of the foreign-born children of its citizens; or the laws of the two countries, while recognizing both sources of allegiance, may coincide in giving a preference, at least during the infancy of the child, to the one or the other source. But, if the conditions be otherwise, and the double claim actually exists, it is conceded to have a valid foundation. A conflict, however, is obviated by the rule—which is indeed but the practical formulation of the doctrine itself—that the liability of the child to the performance of the duties of allegiance is determined by the laws of that one of the two countries in which he actually is.

Another example of double allegiance may be furnished by the case of an infant whose father emigrates and acquires a new allegiance.

In the cases above mentioned it is held that the child on attaining his majority, if the double claim has not sooner been dissolved, has the right to elect which of the two allegiances he will retain; and this election he is required to make.

It is sometimes stated that a double allegiance also exists where a person born in one country afterwards emigrates to and becomes a citizen of another country. That a person in such a situation may be subject to the claims of allegiance in two countries, is in point of fact no doubt true; but it is in point of principle equally true that, when writers place such a case under the head of double allegiance, they at least impliedly hold that the doctrine of voluntary expatriation, as maintained by the United States, is not well founded.

This will the more clearly appear when we discuss, below, the question of expatriation. From the point of view of the doctrine of expatriation, as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance, acquires a new one, has thereafter but one allegiance—that of his adopted country.

#### 1. FOREIGN-BORN CHILDREN.

##### (1) ACT OF 1855.

##### § 426.

The act of February 10, 1855, 10 Stat. 604, provides that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however,* That the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

Rev. Stat. § 1993. This section, which incorporates the substance of the act of 1855, reads as follows: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

"If therefore by the laws of the country of their birth children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist."

Hoar, At.-Gen., June 12, 1869, 13 Op. 89, 91.

"Every independent state has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization, and this, without regard to the municipal laws of the country whose subjects are so naturalized, so long as they remain, or exercise the rights conferred by naturalization, within the territory and jurisdiction of the state which grants it.

"It may also endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the state thus conferring its citizenship.

"But no sovereignty can extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction, from their obligations or duties thereto; nor can the municipal law of one state interfere with the duties or obligations which its citizens incur, while voluntarily resident in such foreign state and without the jurisdiction of their own country.

"It is evident from the *proviso* in the act of 10th February, 1855, viz, 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' that the law-making power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction, but that it has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the fourteenth amendment of the Constitution, have made themselves 'subject to the jurisdiction thereof.'

"The child born of alien parents in the United States is held to be a citizen thereof and to be subject to duties with regard to this country which do not attach to the father.

"The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.

"Such children are born to a double character: the citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen are concerned and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father."

Report of Mr. Fish, Sec. of State, to the President, Aug. 25, 1873, For. Rel. 1873, II. 1186, 1191-1192.

"173. It is provided by law that persons born out of the limits and jurisdiction of the United States, whose fathers were or shall be, at the time of their birth, citizens of the United States, shall be

deemed and considered to be citizens of the United States, provided that the right of citizenship shall not descend to persons whose fathers never resided in the United States. Within the sovereignty and jurisdiction of the United States such persons are entitled to all the privileges of citizens; but while the United States may by law fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it ought not, by undertaking to confer the rights of citizenship upon the subject of a foreign nation who had not come within our own territory, to interfere with the just rights of such nation to the government and control of its own subjects. If, by the laws of the country of their birth, children of American citizens born in such a country are subjects of its government, the legislation of the United States will not be construed so as to interfere with the allegiance which they owe to the country of their birth *while they continue within its territory*. If, therefore, such a person, who remains a resident in the country of his or her birth, applies for a passport as a citizen of the United States, such passport will be issued in the qualified form shown in Form No. 11."

Consular Regulations of the United States, 1881, sec. 173.

The qualified form of passport thus referred to stated that the right of the bearer to ask the aid and protection of the United States was "limited and qualified by the obligations and duties which attach to him [or her] under the laws of the Kingdom [Empire of Republic] of ———, in which he [or she] was born (his [or her] father being then a citizen of the United States), and where he [or she] now resides." (Consular Regulations of the United States, 1881, 515.)

Sec. 173, above quoted, first appears as sec. 115 of the Consular Regulations of 1870, p. 40. It also forms sec. 115 of the Consular Regulations of 1874, p. 31. Similar directions were embraced in sec. 131 of the printed instructions of 1885 to the diplomatic representatives of the United States.

For these sections there was substituted by a circular of the Department of State of June 29, 1885, the following paragraph:

"It is provided by law that 'all children<sup>a</sup> born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be, at the time of their birth, citizens thereof, are to be declared<sup>b</sup> to be citizens of the United States; but<sup>c</sup> the rights of citizenship shall not descend to children whose fathers never resided in

<sup>a</sup> In the statute the word "persons" is used.

<sup>b</sup> This quotation is inaccurate, the statute reading "shall be deemed and considered and are hereby declared to be," etc.

<sup>c</sup> This is in the form of a proviso in the original statute, *supra*.



the United States.' That the citizenship of the father descends to the children born to him when abroad is a generally acknowledged principle of international law."<sup>a</sup>

This section was carried into the Consular Regulations of 1888, sec. 146, and is preserved, with some abbreviation, in the Consular Regulations of 1896, sec. 138, p. 49, and the Instructions to the Diplomatic Officers of the United States of 1897, sec. 138, p. 52.

The object of the change made in the consular and diplomatic instructions in 1885 is set forth in a report of Dr. Francis Wharton, then solicitor of the Department of State, of May 4, 1885, in which it is suggested that the instructions in the form in which they previously stood might be construed as implying a denial of the *civil status* derived from *domicil* in matters of guardianship, legitimacy, marriage, and succession to property. His report contains the following statement:

"The correct rule I apprehend to be that the children born abroad of parents domiciled in the United States partake of their father's domicile, and children born abroad of citizens of the United States partake of their father's citizenship. The possession of these rights continues until the infant arrives at the age of twenty-one, at which age he is entitled to make election as to what nationality and domicile he will accept, which election must be regarded as final. It is true that such children, like all other citizens of the United States residing in a foreign land, may be regarded as bound to render the duty of local obedience. But with the above limitation as to election they are no more subject to the domiciliary municipal laws of such foreign land, or clothed with its nationality, than are any other citizens of the United States temporarily residing abroad. As will be seen by authorities in an exhibit attached hereto, these views are sustained not only by rulings of our own and English courts, but by the opinions of leading jurists who are experts in this branch of law.

"It is true that in a letter of Mr. Hoar, when Attorney-General, dated June 12, 1869, we have the following statement:

"If, therefore, by the laws of the country of their birth children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist." 13 Op. Atty. Genl. 89. See, to same effect, letter of Mr. Fish, Aug. 25, 1873. (For. Rel. U. S., 1873-4, vol. 2, p. 1192.)

"So far as this statement bears on the question of passports, in reference to which it was made, I do not propose to discuss it, though even in this limited relation I doubt its accuracy. But I do unreservedly maintain that by the law of nations no legislation of a foreign state can subject either a person domiciled in one of the United States, temporarily residing in such foreign country, or a child born to him

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<sup>a</sup> Circulars, III. 237.

- during such temporary residence, to the municipal laws of such foreign country, so as to divest him of his home *status*, and to impose on him the *status* of the country in which he is temporarily resident.
- "The consequences of the latter doctrine are so disastrous that it is hard to believe that it was deliberately intended to have been advanced. Were a person domiciled in one of our States (whether an adult or a minor) subjected to the municipal laws of a foreign country, in which he is temporarily resident, and clothed with its *status*, he might be placed permanently under the control of a guardian appointed by the authorities of such country; his legitimacy would be subject to its laws; his marriage would be invalid if made such by its laws; by its laws would the succession to his property be determined; by its laws, as one of its subjects, would his property be distributed in case of his death.
- "For this Department, in its consular regulations and diplomatic instructions, to declare otherwise, would not only contravene the rulings of our courts and the opinions of the great body of modern international jurists, but would interpose a serious difficulty in the way of the obtaining, by persons domiciled in one of the United States, the rights abroad to which they are entitled by the law of nations and by the rulings of domestic courts. We will suppose, for instance, that a person domiciled in the United States, but temporarily resident abroad, is subjected to personal taxation, or to other laws determining *status* in the place of his temporary residence; or that an effort is made to subject his legitimacy, or the legality of his marriage, to the laws of such temporary residence; or to limit his business capacity by such laws, or, on his death, to declare that his estate by such laws is to be distributed. This is contested; and to support this adverse contention, we will suppose that it is said by the authorities of such place of temporary residence: 'Undoubtedly by the law of nations personal *status* is determined by the place of domicile, but by your consular regulations and diplomatic instructions you preclude yourselves from claiming for persons domiciled in your States this right.' But that such a concession should not be made by this Department I maintain for the following reasons:
- "1. Even supposing the question were one of doubt, it ought not to be decided in this summary way against persons domiciled under our flag.
  - "2. The case is one belonging to the States, as domicile is incident to residence in a State (or Territory, as the case may be), and not to residence in the United States as a whole. A person, for instance, may be domiciled in the State of New York, and thus become enveloped in the municipal law of New York; but except as domiciled in New York, he cannot be domiciled in the United States. Domicile by the law of nations, it must be remembered, is residence within a particular state, with the intention to make it a final abode. It may or may not be coupled with domestic political privileges. Domicile, however, and not the possession of political privileges, internationally determines *status*.
  - "But while intention to permanently remain is an essential incident of domicile, this is not inconsistent with temporary absence. It is in relation to persons temporarily absent, and to their children born during such temporary absence, that the rules I have cited bear harshly in denying to them rights to which they are entitled by the law of nations. . . .

"This leaves the question of *status* in such cases to the courts, unprejudiced by any utterances from this Department. It may be that a distinction now taken in England between civil and political domicile may be hereafter internationally accepted, and that it may consequently be held that while domicile without naturalization imposes a civil *status*, determining municipal rights, it does not impose political *status* conferring political immunities, *e. g.*, relief from military or police duties. But be this as it may, no statement should be permitted to remain in the records of this Department sanctioning the view that a person domiciled in the United States is by our action precluded from claiming the municipal rights he is entitled to by the rules of private international law." (17 MS. Opinions of Solicitors of Dept. of State, 305.)

With regard to this paper, it may be observed, in the first place, that a sharp distinction is made in laws and judicial decisions between the civil status derived from domicile and the political status derived from citizenship. This distinction is maintained not only in England and in the United States, but may also be found in various codes of Continental Europe. In some cases, indeed, as in Italy (see *infra*, p. 811), citizenship is made the test of civil as well as of political status; but in no case, it is believed, is political status made to depend upon the civil status of the individual, as derived from domicile, under the rules of private international law. In the second place, it is to be noted that citizenship is the creature of municipal and not of international law. It is true that a person may derive a qualified nationality from the rules of international law in certain relations, particularly in matters of prize; but this is a different thing from citizenship. It has never been supposed, for instance, that a passport might be issued to a British subject as a citizen of the United States, because, by reason of his having a belligerent domicile in the United States, his property perchance might be subject to seizure and confiscation on the high seas in a war to which the United States was a party.

The opinion of Attorney-General Hoar referred, as is admitted, to an application for a passport, and the language which he employs is appropriate to that subject. He speaks of "citizens" and "subjects," and of the "allegiance" which they owe. These words fairly exclude the idea that he intended to deny to any person the civil rights derived from domicile, the determination of which rights, as Dr. Wharton observes, may be left, certainly primarily, to the courts. Passports are granted to an individual as an evidence of his political, not of his civil, status, and their issuance therefore is based, not on domicile, but on citizenship. By the laws of the United States they can be granted only to persons owing allegiance.

The doctrine of "election" necessarily implies the existence of a double allegiance. This condition naturally arises where a person

is born in one country to a father who is a citizen of another country. By rules of municipal law, which generally prevail, such a person has two citizenships by birth—(1) citizenship by virtue of the place of birth (*jure soli*), and (2) citizenship by right of blood (*jure sanguinis*), i. e., by virtue of the father's nationality. Unless this be so, the child on attaining his majority has nothing to elect. So far as domicil may play any part in the matter, its general tendency would seem to be to enhance the claim of the country of residence, since it can hardly be assumed that a person will usually be found to be domiciled in a country other than that in which he lives.

"Robert W. Wilcox, Alexander Smith, and several others, born here of American fathers, have appealed for protection, which I have been unable to extend, they being at present under foreign jurisdiction, with no law or treaty exempting them from the usual rule."

Mr. Willis, min. to Hawaii, to Mr. Gresham, Sec. of State, March 7, 1895, For. Rel. 1895, II. 850, in relation to persons arrested and held under martial law for complicity in the insurrectionary plot in Hawaii in 1895.

Although Lazarus Marks, a native of Prussia, but a naturalized citizen of the United States, had, by reason of his permanent residence in Guatemala since 1870, apparently renounced his naturalization and had ceased to be entitled to an American passport, it was held that his minor sons, although they were natives of Guatemala, were, by virtue of section 1993 R. S., entitled to passports as citizens of the United States until, by attaining their majority, they became "competent to elect another nationality."

Mr. Adee, Acting Sec. of State, to Mr. Combs, No. 71, Sept. 15, 1903, For. Rel. 1903, 595, citing Mr. Hill, Acting Sec. of State, to Mr. Merry, May 7, 1901, in the case of Rafael Franklin Hine, in Costa Rica, For. Rel. 1901, 421.

See, also, Mr. Adee, Acting Sec. of State, to Mr. Beaupré, min. to Arg. Rep., No. 16, Aug. 30, 1904, For. Rel. 1904, 36, in relation to the case of C. L. Tappen.

While the Department of State holds that the minor children of an American citizen who has taken up a permanent residence abroad are by virtue of section 1993, Revised Statutes, entitled during minority to passports, yet the Department has ruled: "If born after the father has become the subject or citizen of another power, or after he has in any way expatriated himself, the children born abroad are to all intents and purposes aliens, and not entitled to protection from the United States." (For. Rel. 1873, II. 1191.) And again: "If the father has, at the time of the birth of a son, abandoned his citizenship in the United States, the son can make no claim to such citi-

zenship." (For. Rel. 1885, 396.) These rulings were applied in the case of Robert Albert Böker, in Germany.

Mr. Hay, Sec. of State, to Mr. Tower, ambass. to Germany, No. 192, May 31, 1904, For. Rel. 1904, 314, citing Van Dyne on Citizenship, 34. Compare For. Rel. 1873, II. 1191.

(2) PARTICULAR APPLICATIONS.

§ 427.

"With regard to the proposed law naturalizing children born in the Argentine Republic of foreign parents, with its retrospective declaration, inasmuch as the Attorney-General of the United States has decided that such individuals born in the United States become endowed with the rights and liabilities of our own citizens, the comity of nations enjoins that we should acquiesce in any analogous legislation."

Mr. F. W. Seward, Act. Sec. of State, to Mr. Kirk, No. 35, Nov. 4, 1863, MS. Inst. Arg. Rep. XV. 183.

See 9 Op. 373, and 10 Op. 321; supra. § 373.

See, to the same effect, Mr. Fish, Sec. of State, to Mr. Kirk, No. 4, June 18, 1869, enclosing a copy of Attorney-General Hoar's opinion of June 12, 1869. (MS. Inst. Arg. Rep. XV. 319.)

"I have to acknowledge the receipt of your letter of July 17, 1867, in relation to your claim to American citizenship. Chile. You are correct in your belief that the circumstance of your mother's being an English woman does not impair the right to citizenship derived from that of your father. The act of Congress to be found in vol. 10 of Statutes at Large, page 604, was passed for the express purpose of removing any doubt on that point. Upon taking up your residence in the United States, you will become a citizen, in the full sense, without any naturalization. At present, however, you are in the position of having a double allegiance, the one which you owe to Chile, from your birth within its jurisdiction, the other due to this Government as the son of a citizen of the United States. Until you make your election to reside in this country, it is not in the power of this Government to protect you against the enforcement of any obligations you may be under as a citizen of Chile or any of the incidental consequences which may result from that character."

Mr. Seward, Sec. of State, to Mr. Vantassel, Sept. 10, 1867, 77 MS. Dom. Let. 78.

See, to the same effect, Mr. Hunter, Act. Sec. of State, to Mr. Dutton, Aug. 7, 1868, 79 MS. Dom. Let. 182.

By chapter 4, article 6, paragraph 1, of the Chilean constitution, all persons born in Chile are declared to be Chilean citizens. On this

ground it was held that the minister of the United States at Santiago properly declined to intervene for the purpose of exempting from service in the national guard the Chilean-born children of American citizens.

Mr. Olney, Sec. of State, to Mr. Strobel, min. to Chile, June 4, 1896, For. Rel. 1896, 34-35.

In 1885 the British minister at Bogotá inquired of the Colombian Government as to its views concerning the national-  
Colombia. ity, while they were in Colombia, of certain children under the following circumstances: Their father was a native British subject; their mother was born in Colombia of British parents; the children were born in Chile, but had removed to Colombia with their widowed mother. The Colombian Government, in reply, referred to paragraph 2 of article 31 of the Colombian constitution, which provides that "the children of a Colombian father or mother, whether born within the territory of the United States of Colombia or not, provided in the latter case they settle in the country, are Colombians." On the strength of this provision, the Colombian Government stated that there seemed to be no doubt that the children of the Colombian mother were citizens of the country, provided they settled in it.

For. Rel. 1885, 208.

The Colombian Government published, Jan. 15, 1885, the following notice:

"According to the tenor of article 31 of the national constitution, all such persons are Colombians, viz:

"(1) Who have been or may be born in the territory of the United States of Colombia, although children of foreign parents transitory sojourners in the same, if they (the children) shall come and settle in the country.

"(2) The children of a Colombian father or mother, whether born in the United States of Colombia or not, if, in the latter case, they shall come and settle in the country.

"(3) Foreigners who have obtained letters of naturalization.

"(4) Persons born in any of the Spanish-American Republics, whenever they have settled in the territory of the Union and declared their desire to be Colombians before a competent authority.

"As several cases have already occurred of Colombian citizens, merely on account of being sons of foreigners, pretending not to be Colombians, the attention of the public is directed to the national prescripts above set forth.

"Notice is likewise given that the issue of passports, whether for the use of Colombians or of foreigners, is a function exclusively pertaining to the constitutional authorities of the Republic." (For. Rel. 1885, 204.)

In communicating this notice to the Department of State, Mr. Scruggs, American minister at Bogotá, January 30, 1885, said:

"I apprehend, in view of the Colombian fundamental law referred to, that persons born in this country whose fathers were at the time

citizens of the United States, have a dual nationality; and that, while in Colombia, their Colombian nationality must prevail.

"In accordance with this principle therefore, and until instructed otherwise by the Department, I shall, if applied to, grant passports to such persons; but with the express caution that such passport will not necessarily confer the right to protection by the United States Government, as against that of Colombia, while the holder remains in Colombia." (For. Rel. 1885, 204.)

V. applied to the American legation in Paris, in 1883, for a certificate or attestation that he had preserved his **France.** American nationality. He was born at Bordeaux, France, in 1862. His father, however, who also was a native of France, had lived in the United States 35 years, and in 1853 was naturalized, but in 1859 returned to France, where in 1874 he died. V. had never been in the United States, and expressed no intention of going there to reside, but stated that he had property interests which might render it necessary for him to visit the United States at some future time. Held, that V. was not entitled to a passport—the usual form of attestation of American nationality to foreign governments.

Mr. Frelinghuysen, Sec. of State, to Mr. Morton, min. to France, Nov. 9, 1883, For. Rel. 1883, 285.

"In 1873 the son of John Peppin, a Frenchman by birth, invoked the protection of this Government against the operation of French military law. The circumstances of his case were these: Peppin, when a young man, emigrated to the United States, was educated in Kentucky, became a citizen of the United States, resided in New Orleans several years, returned to France, married a French woman, and remained in France until his death. Some eight years after his return to France two children were born to him, one of them the son in question, who at the time of his application was eighteen years old. Protection in this case was refused by my predecessor, Mr. Fish."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, Feb. 27, 1884, For. Rel. 1884, 216, 218.

By the French law of December 16, 1874, amending article 1 of the law of February 7, 1851, "any individual born in France of a foreigner who himself was born there is French, unless, in the year following the time of his majority, as fixed by French rule, he claims his foreign nationality by a declaration made either before the municipal authorities of the place of his birth or before the diplomatic or consular agents of France abroad, and establishes that he has maintained his original nationality by an attestation in due form of his government, which will remain affixed to the declaration."

By this law a man born in France of a father who was himself born there, but who had become by naturalization a foreigner, is considered a French citizen unless, before he reaches the age of twenty-two, he establishes in the prescribed manner his retention of his original nationality, that is to say, the acquired nationality of his father. The law of 1874, as above quoted, requires the individual to prove that he has maintained his original nationality by "an attestation in due form of his government;" but the circular issued by the French mayors to the sons and grandsons of foreigners born in France states that each one of them must produce a certificate of the diplomatic agent of the country of which he claims to be a citizen to the effect that he has not lost his original nationality.

Mr. Vignaud, chargé at Paris, to Mr. Bayard, Sec. of State, June 15, 1886, For. Rel. 1886, 301.

But by the law of 1889, as amended by the law of 1893, "any person born in France of foreign parents, one of whom was also born there, is French, except that in the year following his majority he may disclaim his French status, by complying with the requirements of paragraph 4, if it is the mother who was born in France." (Mr. Vignaud, chargé, to Mr. Gresham, Sec. of State, No. 47, Aug. 22, 1893, and enclosure, For. Rel. 1893, 303.)

Children born abroad whose father was, at the time of their birth, a citizen of the United States, are, by virtue of the act of February 10, 1855, citizens of the United States, and within the sovereignty and jurisdiction of the United States are entitled to all the privileges of citizens. As to whether they are entitled, while continuing to reside abroad, to passports as American citizens, the answer must be more qualified. If, by the laws of the country of their birth, such children are subjects of its government, it is not competent by any legislation to interfere with that relation or with the allegiance which they owe to the country of their birth while they continue within its territory. If, therefore, they receive passports as citizens of the United States, such passports should be qualified with the statement that, although they are citizens of the United States, their rights as such are subject to the rights, obligations, and duties which may attach to them under the laws of the country in which they were born and in which they continued to live.

"The conclusions above stated, which I adopt, were affirmed explicitly by Mr. Frelinghuysen, in instructions to Mr. Kasson, January 15, 1885, (Foreign Relations, Germany, 1885), and impliedly by Mr. Frelinghuysen in instructions to Mr. Morton, November 9, 1883 (Foreign Relations, France)."

Mr. Bayard, Sec. of State, to Mr. Vignaud, chargé at Paris, July 2, 1886, For. Rel. 1886, 303, 304, referring to the opinion of Hoar, At.-Gen., June 12, 1869, 13 Op. 89.



"If Karl Klingenmeyer's father [a native of Germany who ~~had~~  
 been naturalized in the United States] was at the  
 Germany. time of his son's birth a citizen of this country [the  
 United States], the son was such a citizen, while possibly by the  
 German law (which I have not at hand) he might also be a citizen  
 of the place of his birth [Germany]. On general principles such  
 conflicting citizenship is decided according to the laws of the one of  
 the two countries claiming allegiance within whose jurisdiction the  
 individual happens to be. (Vol. 13, Opinions Attorneys-General,  
 p. 89.)"

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan.  
 15, 1885, For. Rel. 1885, 396, 398.

"The two sons of Mr. Smith [a citizen of the United States who  
 had been naturalized in Mexico], aged respectively  
 Mexico. seven and ten years at the time of their father's death,  
 were undoubtedly American citizens by birth, inasmuch as the fa-  
 ther's change of allegiance occurred after the birth of the youngest  
 child. If within the jurisdiction of the United States, their right to  
 American citizenship would be unimpaired, and even if within Mexi-  
 can jurisdiction during minority, they would, in the absence of any  
 Mexican law specifically attaching the altered status of the father  
 to his minor children within Mexican jurisdiction, be still properly  
 regarded as American citizens. But if there be such a law, or if on  
 attaining majority they remain in Mexico and come within any pro-  
 vision of Mexican law making them citizens of that Republic, they  
 could not be regarded as citizens of the United States.

"The registration of the younger son, by the widowed mother,  
 after the death of the father, although irregularly and unnecessarily  
 delayed, is in contravention of no rule, the child's citizenship *at birth*  
 being clear."

Mr. F. W. Seward, Acting Sec. of State, to Mr. Foster, min. to Mexico,  
 Aug. 13, 1879, For. Rel. 1879, 824.

As the Mexican law "does not make such a minor [i. e., a child born in  
 Mexico of an alien father] a Mexican during minority," it was held  
 that a minor child, born to an American father in Mexico, might  
 receive there a passport as a citizen of the United States. (Mr.  
 F. W. Seward, Act. Sec. of State, to Mr. Foster, min. to Mexico, July  
 2, 1879, For. Rel. 1879, 815.)

See, also, Mr. F. W. Seward, Act. Sec. of State, to Mr. Noyes, No. 115,  
 Dec. 31, 1878, MS. Inst. France, XX. 7.

"The Russian naturalization law of March 6, 1864, A. 12, provides:  
 Russia. 'Children born of foreigners not Russian subjects,  
 born and educated in Russia, or, if born abroad, yet  
 who have completed their education in a Russian upper or middle

school, will be admitted to Russian allegiance should they desire to do so within the succeeding year after they shall have attained their majority.'

"This provision appears to be permissive, not compulsory, and to contemplate that persons born in Russia of alien parents, may, under certain specified circumstances, make election of Russian citizenship, and thereupon be admitted to such citizenship by some formal act of naturalization.

"The precedents you have examined would seem to have led you into the misapprehension that the theory of dual allegiance during minority is involved, requiring formal option between two conflicting claims. This is, indeed, the case according to the municipal law of certain countries.

"The French rule is typical, and under it 'a person born in France of alien parents and domiciled in France at the time of reaching majority, is allowed one year after attaining majority to elect to retain the citizenship of his parents. In default of so doing at the expiration of that period, and if retaining French domicile, he is to be deemed a citizen of France.' (Foreign Relations, 1891, pp. 493, 494.)

"The contrast between the two rules is clear. In France, upon the expiration of the probationary year following majority, the domiciled alien loses his right to elect the status of his parents. In Russia, as explained to you by the Russian minister, if the election of Russian citizenship be not availed of within the prescribed year, the person loses his right to become a Russian subject.

"The law of the United States does not, as you seem to suppose, provide for option of American citizenship by persons situated as you represent the Powers brothers to be circumstanced. By section 1993 of the Revised Statutes the children born abroad to citizens of the United States 'are declared to be citizens,' with the sole exception that such citizenship shall not descend to children whose fathers never resided in the United States. The precedents you quote contemplate recognition of a formal option, only in the cases where a conflict of laws arises under the legislation of the foreign country of birth and sojourn. In Russia, however, it appears that such conflict does not arise, and that in the event of not acquiring Russian status in the permitted way, the persons in question will be regarded after attaining majority as lawful citizens of the United States."

Mr. Adee, Acting Sec. of State, to Mr. Coombs, min. to Japan, April 28, 1893, For. Rel. 1893, 401.

Mr. Coombs, in a dispatch of March 21, 1893, to which Mr. Adee's instruction is a reply, pointed out, as the result of a consultation with his Russian colleague, an error in the translation of the foregoing pro-

vision of the Russian law, as printed in the Report of the British Royal Commission of 1869 on Naturalization and Allegiance, and reprinted in For. Rel. 1873, II. 1288. (For. Rel. 1893, 393.)

## 2. NATIVE-BORN CHILDREN.

### (1) DOUBLE ALLEGIANCE BY BIRTH.

#### § 428.

An application having been made for a passport for a youth of seventeen, whose father desired to send him to Germany as a student, the Department of State said: "The young man referred to, under the Constitution of the United States, having been born in this country, is, while subject to the jurisdiction of the United States, a citizen of the United States notwithstanding the fact of his father being an alien. As such citizen he is entitled to a passport. This, of course, would be a sufficient protection to him in every other country but that of his father's origin—Germany. There, of course, as the son of a German subject, it may be claimed that he is subject to German military law, and that, not being then subject to the jurisdiction of the United States, he can not claim the rights secured to him by the 14th amendment to the Constitution. It is proper, therefore, that I should add, in the interest of young Mr. J——, that it will be perilous for him to visit Germany at present."

Mr. Frelinghuysen, Sec. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 MS. Dom. Let. 270.

See, to the same effect, Mr. Hunter, Second Assist. Sec. of State, to Mr. Ford, Nov. 18, 1881, 139 MS. Dom. Let. 604.

In Sept., 1878, M. S., the wife of J. A., of the canton of Luzerne, Switzerland, came to the United States with Joseph H., also a Switzer. In April, 1879, she gave birth to a son, who was baptized as the son of Joseph H. Meanwhile, divorce proceedings were instituted in Switzerland by J. A., who obtained a decree of divorce from M. S., *in contumaciam*, shortly after the birth of the son. In August, 1880, M. S. died, and Joseph H. took the child to his home, in the canton of Aargau, Switzerland. The Swiss Federal Council held that the child was a citizen of Luzerne, presumably because it was born before the decree of divorce was granted. The canton of Luzerne, however, suggested that the child was a citizen of the United States, and the question was referred to the American legation, with a view to the issuance of a passport to the child as an American citizen. The legation declined to issue a passport, and its action was approved.

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, No. 36, June 4, 1883, MS. Inst. Switz. II. 178.

"I have received your No. 418, of the 8th ultimo, respecting an application for a passport made by Ludwig Henckel, who states he was born in St. Louis, Mo., January 10, 1874. He was taken in 1875 to Venezuela by his father, who claims to have previously declared his intention to become a citizen of the United States, and who, on January 13, 1882, was appointed consular agent of the United States at San Cristobal, Venezuela. After thirty years' absence, the father returned to Hanover, his native city, taking the son with him. The latter, it appears, is now serving an apprenticeship at Hamburg, and at its expiration, three years hence, 'declares it to be his intention to return to America to reside.'

"Notwithstanding the alienage of the father the son is by birth a citizen of the United States. His absence from the country during minority and while under the control of his father should not be counted too strongly against him, especially in view of the fact that he declares his intention of returning to this country to reside after the completion of his apprenticeship. If he will take the necessary oath to that effect he would seem to come substantially within this rule and a passport may be issued to him. In issuing him a passport, however, it is proper that the legation should inform him that it does not guarantee him against any claim which may be asserted to his allegiance or service by the Government of Germany while he remains in that country. Having been born of a German father, conflicting claims with respect thereto may arise, which it is not the purpose of this Government by the issuance of a passport to in anywise prejudice."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, May 3, 1892, For. Rel. 1892, 189. See Mr. Phelps' No. 418, id. 184.

Similar views were expressed in the case of Alexander Block, id. 184, 188, 191.

The child born to an alien in the United States loses his citizenship on leaving the United States and returning to his parent's allegiance. (Mr. Blaine, Sec. of State, to Mr. O'Neill, Nov. 15, 1881—139 MS. Dom. Let. 572.)

While a person born in the United States, though of alien parents, is by the laws thereof a citizen, yet, should he be taken by his parents while a minor to the country of which they are subjects, he becomes amenable to the laws of that country and subject to a claim of allegiance thereunder *jure sanguinis*. On this ground the Department of State refused to issue a passport for the protection of a minor, born in the United States, whose parents proposed to return with him "for a brief period" to the country (Russia) of which they were subjects.

Mr. Gresham, Sec. of State, to Mr. Seely, March 9, 1893, 190 MS. Dom. Let. 553.

On the other hand, a passport was issued to a minor, born in the United States, whose father had been naturalized as a Russian subject, with a warning that he too might be regarded by the Russian Government as its subject should he voluntarily enter that country. (Mr. Gresham, Sec. of State, to Mr. Foote, Jan. 14, 1894, 200 MS. Dom. Let. 247.)

O. H. R., was born in Baltimore, Md., August 21, 1860, of German parents, who four years later returned to Germany, taking him with them. He remained in Germany till 1881, when he was examined for military service, and, being found then to be unfit for it, was ordered to appear the next year. He then left for America, where he had since resided. The Department of State said: "Upon this state of facts you are under our laws a citizen of the United States, by reason of your birth in this country, but by the German law you are a subject of Germany. Should you voluntarily place yourself again within German jurisdiction, this Government would not be warranted in intervening to protect you from trial and punishment for violation of the military laws of that country."

Mr. Uhl, Acting Sec. of State, to Mr. Rudolph, May 22, 1895, 202 MS. Dom. Let. 298.

Roberto J. J. Pinto was born of Costa Rican parents at San Francisco, Cal., in 1879. His parents resided in California about six years. When he was three years of age they returned to Costa Rica, where they had ever since remained and where the son was reared and educated. He did not speak English and had never been registered at the United States consulate as a person claiming its protection. In 1899, when twenty years of age, he was called upon, in accordance with the law of Costa Rica, to perform military drill. On these facts it was held by the Department of State that the youth was entitled to a passport and protection as a citizen of the United States, as well as to exemption from military service, under article 9 of the treaty between the United States and Costa Rica of 1851, which exempts the citizens of the one country in the territory of the other from all compulsory military service whatsoever. This decision was placed by the Department of State on the following ground: "He [Pinto] was born in the United States, and no principle is better settled than that birth in the United States, irrespective of the nationality of the parents, confers American citizenship. The right of election of nationality, which it is generally conceded a person born under such circumstances has, cannot be exercised until he attains his majority. The father cannot by any act of his alter the status conferred upon the son by his birth in this country. The United States circuit court in *Ex parte Chin King* (35 Fed. Rep. 354) said: 'In my judgment a father cannot deprive his minor child of the status of American citizenship impressed upon it by the circumstances of its birth under the Constitution and within the jurisdiction of the United States. This status, once acquired, can only be lost or changed by the act of the party when arrived at majority,

and the consent of the Government.'” (Mr. HAY, Sec. of State, to Mr. Merry, min. to Costa Rica, Oct. 25, 1889, For. Rel. 1899, 588, 589.)

As the statement above quoted, from the opinion in *Ex parte Chin King*, formed in *Pinto's* case, as it seems to have done less pointedly in certain nearly contemporaneous but less obvious instances, the basis of a departure from what had seemed to be the settled law in regard to double allegiance, it is proper to point out that the statement of the court contained nothing new, unless indeed the court intended, by the phrase “consent of the Government,” to deny the force in the United States of the act of Congress of 1808. It is possible, however, that the phrase was somewhat loosely employed, and if so, the statement contains nothing of special moment, so far at least as the present question is concerned. On the contrary, the legal inability of the parent to deprive his child of his natural allegiance or natural allegiances is itself the foundation of the doctrine of double allegiance in such cases. The father, however, as the head of the family—an institution which it is the policy of all civilized states to preserve—possesses, under normal conditions, as a necessary incident of the parental relation, the power to control the movements and regulate the domicile and national character of his minor children; and if the child, while living under the protection of his home government, is required to perform the duties of allegiance to it, there is in such requirement no denial, express or implied, that he may possess a double nationality. By the laws of the United States the minor children of a naturalized citizen are, if dwelling in the United States, citizens thereof by virtue of the parents’ naturalization. It is believed that no objection has ever been made to the United States enforcing, within its own jurisdiction, either this legislation or the rule, also embodied in its laws, of citizenship by birth *jure sanguinis*.

For the use, on other occasions about the same time, of language similar to that employed in *Pinto's* case, see For. Rel. 1899, 760, 762; 1901, 532. These rulings stand, together with that in *Pluto's* case, by themselves, and have not since been followed.

It may be remarked that the question of protection in cases of double allegiance cannot be determined off-hand by fixed presumptions, since by the law of the particular country in which the question arises a preference may be given during minority to the one source of nationality over the other.

Dec. 31, 1896, the American ambassador at Berlin requested the discharge from the Prussian military service of one Alfred Meyer. He stated that Meyer was born at Baltimore, Md., Dec. 16, 1875, and that his father was a naturalized citizen of the United States.

The German Government, March 14, 1897, denied that the elder Meyer was naturalized in the United States, and stated that as Alfred Meyer had returned with his father to Germany in 1879 and had since resided there, with the exception of a visit to Switzerland in 1895, he was to be considered a Prussian subject, even though he was by birth also an American citizen. Reference was made to a note of Jan. 15, 1886, in the case of Henry Rabien, as showing that

the treaty of Feb. 22, 1868, had no relation to persons of double nationality. The request for Meyer's discharge was therefore refused.

The Government of the United States, April 20, 1897, pointed out that there was an important difference between the cases of Meyer and Rabien, in that Rabien made a formal declaration before a German tribunal that he did not intend ever to settle in America. The case of Ferdinand Revermann, in 1885, was, said the United States, a "case in point." Revermann's father emigrated to the United States from Germany in 1850, was naturalized in Illinois in 1856, and resided continuously in America till 1871. The son was born in Illinois in 1860, was taken to Germany by the father in 1871, and continued to reside there till 1880. In the latter year the landrath at Münster certified that as he was born a citizen of the United States his name would be stricken from the military rolls, and this was done; and Dr. Busch, the German minister for foreign affairs, while contending that the father had renounced his American naturalization, said: "American law, so far as known here, contains no provision which makes the renunciation of American naturalization by the father act upon his minor sons also. The Government of H. M. the Emperor has, therefore, no hesitation in recognizing such persons as American citizens. . . . Individuals possessing this character cannot be made to perform military service in Germany."

In June, 1897, Meyer was discharged from the army as "dienstuntauglich" (unfit for service), but the German Government continued to maintain its opinion as to his liability to perform military duty, and declined to release him from such liability. The case of Revermann was declared to be in a legal sense different from that of Meyer. "With Revermann," said the German Government, "it was the case of an American citizen who was born after his father was naturalized in America, and who therefore never possessed German nationality, and on his coming to Germany was to be solely regarded an American citizen. With Alfred Meyer, on the other hand, the acquisition of American citizenship was based solely on his birth in the United States, while the naturalization of his father in America could not be proved. According to investigations made, the latter remained a Prussian subject until the time of his death. His son, therefore, also possesses German nationality by descent, and if through his birth in Baltimore he is considered by the American side as at the same time an American citizen, it can only be stated that through his double nationality he will have to fulfill his duties toward both countries."

Mr. Uhl, Am. amb., to Baron Marschall, min. of for. aff., Dec. 31, 1896; For. Rel. 1897, 195; Baron Marschall to Mr. Uhl, March 14, 1897, id. 195; Mr. Sherman, Sec. of State, to Mr. Uhl, April 20, 1897, id. 196;

Baron von Rotenhan, acting min. of for. aff., to Mr. White, Am. amb., July 23, 1897, id. 201.

See, also, Mr. Adee, Second Assist. Sec. of State, to Mr. Willniskl, Aug. 19, 1897, 220 MS. Dom. Let. 352.

Albert F. Gendrot was born at Cambridge, Massachusetts, April 28, 1866, his father being a Frenchman, who had resided in the United States since 1847. In 1870 the father returned to France, but after remaining there a few years he resumed his residence in Boston. In 1885, however, he went back to France with his family, including his son Albert, then nineteen years of age, who bore an American passport. In 1887 Albert was notified to perform military duty, and, on failing to respond, was arrested and imprisoned. In reply to an appeal made in his behalf by the United States legation in Paris, the French Government stated that, as by the French law a person born abroad to French parents was French, the case presented no irregularity. The legation answered that the case was not one in which the rule of *jus sanguinis* could be "strictly applied;" that at the time of Albert's birth his father was "regularly domiciled" in the United States, where he resided thirty years, giving his son an American education, and that the latter was only "temporarily" in France.

The Department of State approved the course of the legation, and instructed it to use its "good offices" to obtain Gendrot's release from military service, and added: "You will, however, advise him that his remaining in France after he becomes of age may be regarded as an election of French nationality (see Wharton's Digest, vol. 2, § 183, pp. 396-7, 2d edition), and that his only method of electing and maintaining an American nationality is by a prompt return to this country."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Dec. 28, 1887. For. Rel. 1888, I. 498. See, also, For. Rel. 1888, I. 495-498.

The French Government subsequently stated that Gendrot, if he desired to assert his American citizenship, should apply to the courts, since the military authorities would strike his name from the rolls only on the strength of a judicial decision declaring him to be an alien. The legation subsequently reported that, being about to be rearrested and imprisoned, he had left France, since he understood that, as he was by French law a Frenchman, an application to the courts could not be successful. (For. Rel. 1888, I. 499.)

In 1898 Gendrot returned clandestinely to France, thinking that his presence would not be detected. Early in 1899, being then thirty-three years of age and having passed the period of military service in the active army, he was notified to appear before the military authorities to explain why he did not comply with the order issued to him in 1887 to join the regiment to which he had been assigned. Again the legation intervened, representing that as he had passed the age of



active service he might, according to the law of 1889, renounce his French citizenship without the permission of the French Government. The case came before the second council of war, February 18, 1899, and upon application of his attorney, whom the court had assigned to him, a decision was postponed in order that he might have the question of his nationality decided by a civil tribunal. It appearing that Gendrot would probably be unable to employ counsel before the civil tribunal, the embassy of the United States was directed, if necessary, to arrange with its counsel to look after the case, with the understanding that a reasonable fee might be charged for the service. In the last report of the case by the embassy, April 5, 1899, the civil proceeding was not yet terminated. On March 29, 1899, however, an important note was addressed to the embassy by Mr. Delcassé, minister of foreign affairs. In this note the ground was taken that Gendrot must be considered as French in accordance with article 8, section 1, of the Civil Code (old article 10), and that the question whether an individual had lost his title to French citizenship by establishing himself abroad without any intention of returning depended upon matters of fact "which the courts, sovereign judges in questions of nationality, can alone decide." Finally, said Mr. Delcassé, the fact that Gendrot had passed the age of service in the active army did not give him the right to claim foreign nationality. He could make effective such a claim "only by showing that he has been naturalized in the United States in accordance with the laws in force." Moreover, in order that his naturalization might be effective with regard to France, he "should have a formal authorization." Hence he remained in the position of one still subject to the obligations of military service in the active army. "It is," said Mr. Delcassé, "the fact of having complied with the obligations of the military service in the active army and in the reserve, and not the fact of having reached the age when one is transferred to the territorial army, which enables a Frenchman to have himself naturalized abroad without the consent of the Government."

Commenting on this note the American ambassador said: "The minister of foreign affairs, expressing the view of the minister of justice, assumes quite a new position. In its correspondence with this embassy, and particularly in the case of Giron (1897), the French Government had admitted that a Frenchman having passed the age of service in the active army was no longer obliged to obtain permission from the French authorities to change his original nationality, an admission which is in strict conformity with the revised article 17 of the Civil Code."

Mr. Porter, ambass. to France, to Mr. Hay, Sec. of State, April 5, 1899,  
For. Rel. 1899, 271.

In a letter of November 26, 1897, Mr. Adee, Second Assistant Secretary of State, replying to an inquiry of Gendrot's before the latter went to France, said: "Should you voluntarily put yourself within French jurisdiction, the dual claim of that country to your allegiance would revive and you could scarcely hope to escape judicial proceedings, perhaps under added disadvantage of being regarded as a fugitive from military service by reason of your return to the United States in 1888. There is no naturalization treaty between the United States and France. Under the French code a person born a Frenchman can only lose that status by process of law, one of the causes of such loss being naturalization in a foreign country. You have not been naturalized in the United States, and the fact of your being born in the United States is by French law no bar to the French claim upon your allegiance; it is, on the contrary, a case expressly provided for by that law, so that the French courts will be precluded from declaring you to be anything but a French citizen should the case actually arise for judicial determination. This contingency, however, could not arise, so far as seen, except by your own voluntary act in returning to France, and in such a case it is doubtful if this Government could efficiently protect you outside of its own jurisdiction." (For. Rel. 1899, 269-270.)

(2) CHANGE OF PARENTS' NATIONALITY.

§ 429.

The 4th section of the act of April 14, 1802 (Rev. Stat. § 2172), making children of naturalized persons citizens, "is only a municipal law, and can have no effect beyond the jurisdiction of this government and especially in Holland, if it should be in conflict with the local law of that country. If, therefore, Johannes [whose citizenship was contested] voluntarily placed himself within Dutch jurisdiction, his rights and his obligations must be measured by the laws of Holland and not by the laws of the United States."

Mr. Marcy, Sec. of State, to Mr. Wendell, Sept. 7, 1854, 43 MS. Dom. Let. 102.

S., a Prussian subject by birth, emigrated to the United States in 1848, and became naturalized in 1854. In the following year a son was born to him. Four years later S. returned to Germany with his family, including the infant son, and settled at Wiesbaden, in Nassau, where he afterwards resided. In 1866 Nassau became incorporated into the North German Confederation. In 1874, on reaching the military age, the son was called upon by the German Government to perform military duty. The father invoked the intervention of the American legation at Berlin, but declined to give any assurance as to return to the United States. By Art. IV. of the treaty of 1868, between the United States and North Germany, it is stipulated that if a citizen of the one country, naturalized in the other, renews

his residence in the country of his origin without an intent to return to the country of his adoption, he "shall be held to have renounced his naturalization," and that "the intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." Held, (1) that the father must be deemed to have abandoned his American citizenship and to have resumed the German nationality; (2) that the son, being a minor, acquired under the laws of Germany the nationality of his father, but did not thereby lose his American nationality; (3) that upon attaining his majority, the son might, at his own election, return and take the nationality of his birth or remain in Germany and retain his acquired nationality; (4) yet that during his minority and while domiciled with his father in Germany, he could not rightfully claim exemption from military duty there.

*Steinkauler's case*, *Pierrepont*, At. Gen., 1875, 15 Op. 15.

The minor child of a Spaniard, born in the United States and while in the United States, or in any other country than Spain, is a citizen of the United States. "The United States has, however, recognized the principle that persons although entitled to be deemed citizens by its laws, may also, by the law of some other country, be held to allegiance in that country." (Mr. Fish, Sec. of State, to Mr. Cushing, Feb. 16, 1877, MS. Inst. Spain, XVIII. 115.)

See, also, *Steinkauler's case* affirmed, in Mr. Wharton, Act. Sec. of State, to Mr. Goldsmith, Sept. 3, 1890, 179 MS. Dom. Let. 88.

"If the father . . . did in fact renounce his American citizenship and resume his original allegiance, in a manner recognized by the laws of his native country, that fact would operate as a renunciation of the adopted citizenship for his minor children, at least while they remain within the jurisdiction which their father reacknowledged."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, *For. Rel.* 1885, 396, 397.

In April, 1885, John L. Geist applied to the American legation at Berlin for a passport as a citizen of the United States. He was then sixteen years of age, having been born in the United States in 1869. He gave as his reason for wishing a passport the fact that he had been notified by the German authorities that he might not remain in Germany later than the 1st of the following August. It appeared that his father, a German subject by birth, emigrated to the United States in 1854, but was not naturalized till 1872. Subsequently, in the same year, he returned to Germany, where, early in 1885, he was formally readmitted to German allegiance. In the certificate of readmission it was expressly stated that it included five of his minor children, who were designated by name. John L. was not among them. It was held that he was entitled to a passport for the following reasons:

1. That, at the time of his birth, his political as well as civil status was in the United States.

2. That, under ordinary circumstances, his status in both relations would have followed that of his father when the latter returned to Germany and resumed his German nationality, but that, as the certificate of readmission by its own terms impliedly excluded the son, the change of the father's nationality and domicile did not affect the nationality and domicile of the child; that the German Government not only accepted the father's change of nationality on the conditions specified, but, by requiring the son to return to the United States at a specified time, conceded the continuance of the latter's American nationality.

Mr. Kasson, min. to Germany, to Mr. Bayard, Sec. of State, April 15, 1885; Mr. Bayard, Sec. of State, to Mr. Pendleton, min. to Germany, May 12, 1885, For. Rel., 1885, 408, 414.

“By the law of nations, an infant child partakes of his father's nationality and domicile.”

Mr. Porter, Act. Sec. of State, to Mr. Winchester, min. to Switz., Sept. 14, 1885, For. Rel. 1885, 811.

“It has been settled by frequent rulings in this Department that when a child, who is born in the United States to a father temporarily here residing, returns with his father to the latter's country of native allegiance, such child cannot, during his minority and his residence in such country, call on this Department to intervene in his behalf against such country. In the present case the child was posthumous; the father, though he had taken up a ‘permanent’ residence here and had therefore acquired a New York domicile, had been here but four years at the time of his death, and had not been naturalized; and the mother, in 1870, when the child was one year old, took him back to Germany, where she has resided with him ever since. An interesting question here arises as to whether a widowed mother can, by the principles of international law, change, by her own action, without the approval of the court of the child's domicile, the child's domicile and nationality. That it cannot be so changed is held by eminent continental jurists. (Bar, § 31; 1 Foelix, pp. 54, 55, 94; Denisart, Domicile, § 2.) ‘Der Wittwe,’ says Bar, whose authority both in Germany and this country is deservedly high, ‘kann dagegen das Recht das Domicil ihrer minderjährigen Kinder zu verändern, nicht zugestanden werden.’ To the same effect is *Lamar v. Micou*, 112 U. S. 452. According to this view the mother of the child in question could not, on the bare facts stated to us, change his domicile so as to withdraw him from the protection of the United States. But as he is now in Germany the question is

one which, if military service be insisted on, must be presented to the German Government for consideration, and their views heard before this Department can express any final determination in this relation.

"The treaty of 1868 provides that 'citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.' This, however, does not say that persons not falling within this class who are domiciled in the United States shall not obtain from Germany those rights to which such persons are entitled by international law."

Mr. Bayard, Sec. of State, to Mr. Liebermann, July 9, 1886, 160 MS. Dom. Let. 667.

"The general view held by this Department is that a naturalized American citizen by abandonment of his allegiance and residence in this country and a return to the country of his birth, *animo manendi*, ceases to be a citizen of the United States; and that the minor son of a party described as aforesaid, who was born in the United States during the citizenship there of his father, partakes during his legal infancy of his father's domicile, but upon becoming *sui juris* has the right to elect his American citizenship, which will be best evidenced by an early return to this country."

Mr. Bayard, Sec. of State, to Mr. de Weckherlin, April 7, 1888, For. Rel. 1888, II. 1341.

A person who stated that he was a German by birth, that he served in the United States Navy during the Civil War, and that he had been a citizen of the United States since 1876, but that he intended to visit Prussia "to stay for several years and perhaps permanently," inquired (in 1896) as to what would under these circumstances be the status of himself and his four minor sons, the eldest of whom was nineteen years of age and the youngest four. The Department of State, referring to Art. IV. of the treaty with the North German Union of Feb. 22, 1868, by which the renewal of residence in the country of origin, without an intent to return to the country of adoption, operates as a renunciation of naturalization, replied that, in case of such renewal of residence, the children, though they were born in the United States, "would be required to elect citizenship on attaining their majority, provided they were still within German jurisdiction," and that, if they decided to retain their American citizenship, "the best evidence of this fact would be their return to the United States to remain and discharge their obligations and duties as such."

Mr. Olney, Sec. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406.

## 3. ELECTION AT MAJORITY.

## § 430.

"It is quite clear that the two young Boisseliers, being native born citizens of the United States, and now subject to the jurisdiction of the United States, can not be held under any law, municipal or public, to owe military service to the German Government. Their rights rest on the organic law of the United States. The Constitution declares (Article XIV. of the Amendments) 'That all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' This is the supreme law of the Republic, available alike to all its citizens, whether native or naturalized, and binding upon every Department and officer of this Government. The brothers Richard and Caspar Boisselier, in their present political status, fulfil all its conditions. Their father, it is true, took them to Schleswig when they were quite young, the one four and the other two years old. They lived there many years, but during all those years they were minors, and during their minority they returned to the United States; and now, when both have attained their majority, they declare for their native allegiance and submit themselves to the jurisdiction of the country where they were born and of which they are native citizens. Under these circumstances, this Government cannot recognize any claim to their allegiance, or their liability to military service, put forth on the part of Germany, whatever may be the municipal law of Germany under which such claim may be asserted by that Government.

"It follows from this view that any property which they now possess in the German dominions, and any property which they may hereafter acquire in that country, either by purchase, inheritance, or testamentary succession, must be held to be free from liability on grounds arising from their refusal to submit themselves to that Government for the performance of military service. Whether or not the father, Carl Gerhard Boisselier, may by his continued residence in Schleswig have resumed his original nationality and renounced his American citizenship is a question which I do not now undertake to determine nor is its determination deemed essential to the present question."

Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, June 6, 1879, MS. Inst. Germany, XVI. 469.

The father, C. G. Boisselier, was naturalized in the United States in 1848. He returned to Schleswig in 1856, after having lived in the United States 19 years. His two sons were born in St. Louis, Mo., in 1852 and 1854, respectively. Though their father took them with him to Schleswig, they returned to America during their minority. Sub-

sequently they received notices from the Schleswig authorities to report for military service. These notices were served upon them by German agents in the United States, while their father was threatened with penalties in case they failed to appear, such penalties to be enforced against any property which he might give or devise to his sons; and it was stated that, finally, he was notified that unless they appeared in court on July 2, 1879, they would be prosecuted under sec. 140 of the penal code, and that all such property as their father might bequeath to them would be confiscated to the state. Mr. White was instructed to express to the Imperial Government the earnest desire of the President that any proceedings pending or contemplated against the property of the sons, based on their refusal to submit to the demand for military service, be at once put an end to.

For further proceedings in this case, see Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, July 28, 1880, MS. Inst. Germany, XVI. 592. See, also, as to the same principle, in the case of Ferdinand Revermann, Mr. Frelinghuysen to Mr. Kasson, Feb. 7, 1885, MS. Inst. Germany, XVII. 468. See *supra*, p. 536.

P. was born in New York in 1854. His father was a native of Denmark, but was said to have been naturalized in the United States; his mother was of American nativity. At the age of four years he was taken abroad by his parents, with whom he lived, at times in England and at times in Denmark. On attaining his majority, being then in Denmark, the authorities called upon him for military service. He asserted his American citizenship. The authorities recognized it, but commanded him as an alien to leave the country. He repaired to England; but, after some years' stay there, returned to Denmark, where, at the instigation of his father, he was put into a lunatic asylum. From the asylum he was soon discharged; but when he again sought to go to England, with a view, it was alleged, to proceed to the United States, the Danish authorities, at the instigation of his father, prohibited him for the time being from leaving the country. He then invoked the interference of the American legation. On these facts Mr. Evarts, while holding that P. was a citizen of the United States by birth, said: "He lost no time, when he attained the age of majority, in declaring that he claimed the United States as his country, and that he considered himself a citizen of the United States. He appears to have adhered to this choice ever since, and now declares it to be his intention to return to this country and reside here permanently. His father's political status (whether a citizen of the United States or a Danish subject) has no legal or otherwise material effect on the younger P——'s rights of citizenship. Under these facts and conditions it will be proper for you to bring the claim to the attention of the Danish Government, with a view to the removal of any obstacles to his departure that may now exist at the instance

of the local authorities. It is not doubted but that a simple statement of the facts will be sufficient to accomplish that result."

Mr. Evarts, Sec. of State, to Mr. Cramer, No. 337, Nov. 12, 1880, 15 MS. Inst. Denmark, 226.

"We now reach a point less easy of decision, and that is, assuming that the father resumed German citizenship during the son's minority, what are the son's rights as against this Government upon reaching the age of twenty-one years, for there is no doubt that during minority his rights, if he had any other than those possessed by his father, were at least suspended and subject to the father's allegiance.

"The statute of the United States (Revised Statutes, section 1993) declares that all children born without the United States whose fathers 'were or may be at the time of their birth citizens thereof,' are themselves citizens of the United States, but that right 'shall not descend to children whose fathers never resided in the United States.'

"Therefore, if Mr. Karl Klingemeyer's father was at the time of his son's birth a citizen of this country, the son was such a citizen, while possibly by the German law (which I have not at hand) he might also be a citizen of the place of his birth. On general principles such conflicting citizenship is decided according to the laws of the one of the two countries claiming allegiance within whose jurisdiction the individual happens to be. (13 Op. At.-Gen. 89.)"

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, mln. to Germany, Jan. 15, 1885, For. Rel. 1885, 396, 397.

"While the law is indisputable that the child of an American father, born abroad, takes his father's nationality when an infant, I apprehend that the rule also is settled that when he arrives at full age he may elect or surrender such nationality and accept that of the country of his birth and residence. The preponderance of authority is that when such election is made it is final."

Opinion of Dr. Francis Wharton, law officer of the Department of State, April 29, 1885, communicated by Mr. Bayard, Sec. of State, to Mr. Smithers, chargé at Peking, May 4, 1885, For. Rel. 1885, 171, 172.

In cases of double allegiance, the child, when he becomes of age, "is required to elect between the country of his residence and the country of his alleged technical allegiance. Of this election two incidents are to be observed; when once made it is final, and it requires no formal act, but may be inferred from the conduct of the party from whom the election is required . . . If he [Robert Emden, born in Switzerland in 1862, and now 23 years old, his father being a person of Swiss origin, who had been naturalized in the United States] solemnly elected, on arriving at full age, to be a citizen of the United



States, the proofs of such election must be produced. If, on the other hand, he made no such election, but by remaining in Switzerland is to be inferred to have accepted Swiss nationality, he can not now obtain a passport as a citizen of the United States. If this be the case, his proper course, should he desire to become a citizen of the United States, is to come here in person and become naturalized."

Mr. Porter, Act. Sec. of State, to Mr. Winchester, min. to Switzerland, Sept. 14, 1885, For. Rel. 1885, 811.

The Department of State, in referring to the age of majority where persons are claiming American citizenship, means the usual age of majority in the United States—that is to say, twenty-one years. (Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, min. to Switzerland, Feb. 13, 1885, For. Rel. 1885, 795, 796.)

It was held that Moritz Philipp Emden, father of Robert Emden, was not entitled to a passport as a citizen of the United States, it appearing that he returned to Switzerland in 1854, the year of his naturalization, and had continued to reside there, and that he gave indefinite and ambiguous answers to the question as to his intention to resume his residence in the United States. (Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, May 7, 1887, For. Rel. 1887, 1065.)

With regard to the case of Victor Labroue, who was born in France of an American father, and who was still living in that country, the Department of State said: "This election [of allegiance] can not be made by Victor Labroue until he arrives at full age in September, 1886, and the election, to be operative, must not only be formally and solemnly declared, but must be followed by his coming to and taking up his abode as soon as is practicable in the United States. Should he remain voluntarily in France after the period when the French law, as well as the law of nations, requires him to make his election, this may properly be regarded as an abandonment of American and an acceptance of French allegiance."

Mr. Bayard, Sec. of State, to Mr. Vignaud, chargé at Paris, July 2, 1886, For. Rel. 1886, 303, 304.

"Friedrich de Bourry, according to the allegations in his memorial, was born in the city of New York on December 4, 1862, of Austrian parents, then temporarily resident in that city, and there remained with them until he was five years of age, when he accompanied his mother to Europe. In 1869 he and his mother, residing in Vienna, were joined in that city by his father, who died in 1880. Under the Austrian Government Friedrich de Bourry, the memorialist, has remained until this day, employed in the Austrian railway service. It is not claimed that his father was ever naturalized, or made the requisite declaration of his intention to become a citizen of the United States, or in any way signified his intention formally to abjure his

Austrian allegiance. Nor is it pretended that when, on December 5, 1883, the present memorialist arrived at full age, he took any steps to make or record his election of citizenship in the United States. For several years before that date he was old enough, with his mother's permission, which it is plain from her affidavit she was ready to give, to come to the country of his birth if it had been the country of his intended citizenship. He alleges no effort of this kind, nor any act or event indicating his election of United States citizenship when he arrived at full age.

"Under these circumstances it is not necessary for me to consider the question whether Friedrich de Bourry was, at the time of his birth, a citizen of the United States under the naturalization statutes and the fourteenth amendment of the Constitution of the United States. It is enough to say that he has exhibited no such proof of an election, on arriving at full age, of United States citizenship as now entitles him to a passport. An election in a case of dual or doubtful allegiance, which is the utmost which can be claimed in the present case, must be made on attaining majority, or shortly afterwards, and must be signified by acts plainly expressive of intention, such as immediate preparations to return to the elected country.

"In the present case there is no evidence that an election to become a citizen of the United States was ever made or intended, but on the contrary all the facts create the presumption that an Austrian domicile was chosen."

Mr. Bayard, Sec. of State, to Mr. Lee, chargé at Vienna, July 24, 1886, For. Rel. 1886, 12.

See, also, the case of C. L. George, For. Rel. 1885, 420; For. Rel. 1887, 402-404; and *supra*, § 392.

In 1887, Emil Stucker, who was then residing at Odessa, in Russia, applied to the American legation for a passport. He was born in England, May 12, 1863. His father, the place of whose nativity does not appear, had been naturalized in the United States, but soon after his naturalization he returned to Europe where he ever afterwards resided, dying in Paris in April, 1887. It appeared that Emil Stucker, who had never been in the United States, and expressed no purpose to go there to reside, had for some years been in business in Europe, and that on one occasion, when he was living in Bremen, being suddenly called to Russia on business, he obtained "British protection." He had never taken any oath of allegiance to Great Britain. On the facts, the legation decided that he could not be considered an American citizen. This decision was approved, the Department of State saying: "The fact that Stucker's father had resided over twenty years abroad after his naturalization, and died there last April without having returned to the United States, and

the further circumstance that the son has always resided and even been in business in Europe, without any apparent intention of ever residing in the United States, are quite sufficient ground for questioning the son's *bona fides* as an American citizen and for refusing to acknowledge him as such by issuing him a passport, the more especially as he admits having obtained British protection temporarily in Bremen."

Mr. Lothrop, min. to Russia, to Mr. Bayard, Sec. of State, June 6, 1887;  
Mr. Porter, Act. Sec. of State, to Mr. Lothrop, June 30, 1887, For. Rel. 1887, 965, 967.

"As to . . . persons born in the United States of French parents, the rule is that while such persons remain in the United States they are citizens of the United States; but that should they go to France, and there, when they arrive at the age of twenty-one, elect to be French citizens, they lose all claim to the protection of the United States.

"It has further been repeatedly held by us, as you are aware, that when a person thus born in the United States arrives at twenty-one in a foreign country, the mode of expressing his election to be a citizen of the United States is by promptly returning to the United States. The same distinction is applied to children born abroad to the citizens of the United States. There is, in both these cases, what is called double allegiance; and by the law of nations the nationality of such persons is to be determined by their own election of nationality at their majority, which election is evidenced by placing themselves in the country they elect. Should such persons after electing the United States, and here taking up their domicile, go to France for a transient visit, it will be your duty to protect them as citizens of the United States."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Feb. 15, 1888, For. Rel. 1888, I. 510, 511.

"A child born abroad of American parents, or in the United States of foreign parents, although subject to the parental domicile during minority, has, on becoming *sui juris*, the right of election of citizenship; and, in the event of choosing American nationality, the best proof of such election is to be furnished by continued residence in the United States, or by return hither, if abroad, and the discharge of the duties and obligations of the elected citizenship."

Mr. Bayard, Sec. of State, to Count Sponneck, Danish min., April 10, 1888, For. Rel. 1888, I. 489.

To the same effect—that the child, while a minor, partakes of the father's "nationality and domicile," with a right "when he becomes of full age to elect his nationality"—see Mr. Bayard, Sec. of State, to Mr. McClernan, Oct. 29, 1885, 157 MS. Dom. Let. 482.

See, also, Mr. Bayard, Sec. of State, to Mr. Stallo, No. 48, Feb. 17, 1887, MS. Inst. Italy, II. 344.

A's father came to the United States in 1849, and in 1854 was naturalized. He then left the United States, and afterwards remained abroad, dwelling after 1878 in Germany, where, about 1888, he died. A was born in London in 1864; and in 1889, when nearly twenty-five years old, his father being dead, applied to the American legation in Berlin for a passport. He had never been in America, and the only statement he made with regard to his intentions was that he expected to go to the United States "within the next five years." It was conceded that A., having been born abroad to an American father (assuming that the latter had not at the time renounced his American naturalization), was, under the laws of the United States, an American citizen, with a right on attaining his majority to elect American nationality; that such election might have been manifested "by his coming to the United States and assuming the duties and responsibilities of American citizenship;" that, as there was no allegation that he was prevented from so doing, it was to be inferred that his subsequent claim of such citizenship was "founded solely upon considerations of personal convenience;" and that the Department of State "would fail in its duty to the people of the United States if it permitted the high privileges of American citizenship to be so used."

Mr. Blaine, Sec. of State, to Messrs. Shellabarger & Willson, May 21, 1889, 173 MS. Dom. Let. 152.

A. F. was born in Louisiana in 1863 of a native German father, who was naturalized as a citizen of the United States in 1859. The father died in 1867, and in the following year A. F. went with his mother to Hamburg, where he had since continuously resided. In 1891 A. F. got a passport from the legation of the United States, alleging that he intended to return to the United States within two years. He applied in 1893 for its renewal. Held, that he had elected German citizenship and was not entitled to a passport.

Mr. Gresham, Sec. of State, to Mr. Lainfield, June 2, 1894, 197 MS. Dom. Let. 231.

It is to be observed that in this case the father's naturalization, as well as the son's birth, took place before the conclusion of the naturalization treaties with the North German States.

Edward Kovacsy was born in the city of New York in 1874. His father was a native of Hungary, who emigrated to the United States in 1871 and was naturalized in 1876, two years after Edward's birth. In 1878 the father returned with his family to his native home, where they afterwards continuously resided. The father claimed to have preserved his American citizenship, but he was engaged in business

in Hungary, had reared and educated his son there, and declared that he never had had any intention to return to the United States, unless for a visit, since he left it in 1878. In 1895 Edward, being then 21 years of age, was summoned to appear for examination as a soldier in the Hungarian army. The father appealed to the United States legation for its intervention, on the ground that his son was an American citizen. The son declared that he did not intend to go to America to reside, but expected to remain in Hungary during his natural life. The minister of the United States at Vienna refused to issue him a passport or otherwise to intervene in his behalf, unless he would elect to go to America and in good faith take upon himself the duties of citizenship there. This condition having been declined, the minister refused to interfere, saying that he would accept nothing less "than an actual renouncement of the domicile so long maintained in Hungary and a return to the United States in good faith to make it his permanent home." His action was approved.

Mr. Tripp, min. at Vienna, to Mr. Olney, Sec. of State, June 30, 1895; Mr. Adeo, Act. Sec. of State, to Mr. Tripp, July 23, 1895; For. Rel. 1895, I. 20-22.

"As you allege that your father, a naturalized citizen of the United States, 'settled' in Cuba in 1820, where he married, reared his family and apparently resided until his death, there may be some question whether at the time of the birth of his children he had not abandoned his American citizenship. Admitting, however, that your father was a citizen of the United States at the date of your birth, you and your brothers, in order to conserve your American citizenship, should, on reaching your majority, have come to the United States to reside. You are no longer 'children.' Your citizenship is no longer derivative, but a matter of personal election. You did not come to the United States on attaining your majority, nor do you now express any intention of ever coming to this country to reside. You are therefore, in the Department's opinion, clearly not entitled to claim the protection of this Government."

Mr. Olney, Sec. of State, to Mr. Ory, Dec. 27, 1895, 206 MS. Dom. Let. 609. See, to the same effect, Mr. Olney, Sec. of State, to Mr. Desvignes, April 2, 1896, 209 MS. Dom. Let. 139.

As a rule, the question of election assumes a practical form, in consequence of a claim made to the individual's allegiance by the country in which he actually resides. In 1896, however, the question of renunciation was mooted, in a case where, the two original allegiances being American and German, the German Government held that the individual, who was then residing in Alsace, had, by reason of previous residence as a minor with his father for twelve years in France,

lost his German citizenship, and might be expelled as an alien. It seems that he had attained his majority two and a half years before the question of expulsion was raised, and that he had spent the interval chiefly or wholly in Alsace. The question, therefore, to be determined was whether his "domicil abroad for some two and a half years after attaining majority operates as a positive abandonment of his American status." This question was reserved, to be determined upon the duly ascertained circumstances of the case, if it should be presented in such a way as to require a decision, e. g., by an application for a passport.

Mr. Olney, Sec. of State, to Mr. Uhl, amb. to Germany, Nov. 20, 1896, MS. Inst. Germany, XIX. 684. See also, Mr. Olney, Sec. of State, to Mr. von Reichenau, No. 247, Nov. 20, 1896, MS. Notes to German Leg. XI. 683.

Mr. Olney observed that in most of the cases that had arisen the law of the foreign country had required an election to be made "within one year after attaining majority, as is the rule in France." In other cases, where there was no local law or regulation on the subject, a relinquishment of the right to protection as an American citizen, while continuing to reside abroad, had been inferred from circumstances, the party having had an opportunity to dispute the adverse presumption and establish good faith.

W., sr., was born in Alsace in 1831, emigrated to the United States in 1847, and in due time was naturalized. In the latter part of the "sixties" he returned to Alsace and settled there permanently. There, in 1875, was born W., jr., whom the German authorities in 1899, on his asserting American citizenship, threatened to expel as an alien. He had never been in the United States. It was held that, even conceding that his father at the time of his birth still remained an American citizen, W., jr., "did not evidence an election of American nationality by coming to the United States when he arrived at the age of 21, three years ago, nor does he now evince any intention of coming to the United States to reside," and that he therefore was "not entitled to the intervention of this Government in his behalf."

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, No. 959, Nov. 4, 1899, MS. Inst. Germany, XXI. 104.

David Marks, 26 years of age and a native of Guatemala, where he still lived, although the son of a naturalized citizen of the United States, was held not to be entitled to a passport, "because he has, by his permanent residence in Guatemala, the land of his birth, where he intends to remain, inferentially elected other nationality than that of the United States."

Mr. Adee, Acting Sec. of State, to Mr. Combs, No. 71, Sept. 15, 1903, For. Rel. 1903, 595.

## XII. QUESTION OF EXPATRIATION.

## 1. COMMON-LAW DOCTRINE.

## § 431.

The Declaration of Independence enumerates as among the "unalienable rights" with which "all men" are "endowed by their Creator," "life, liberty, and the pursuit of happiness." Whether these comprehended, incidentally, the right of the individual to renounce his allegiance at will, is a question on which opinions differed. The courts of the United States, prior to 1868, often implicitly accepted the common-law doctrine that a citizen can not at will renounce his allegiance.

2 Kent's Comm. 49; 3 Story's Constitution, 3, note 2; Whart. State Trials, 654; Whart. Conf. of Laws, § 5; Lawrence's Wheaton (1863), 918; *Inglis v. Trustees of the Sallor's Snug Harbor*, 3 Pet. 99; *Shanks v. Dupont*, 3 Pet. 242, 246; *The Santissima Trinidad*, 7 Wheat. 283; *Portier v. Le Roy*, 1 Yeates (Penn.) 371. *Contra*, *Alsberry v. Hawkins*, 9 Dana (Ky.), 178. The utterances of the Executive Department, down to 1868, were by no means consistent. But by Mr. Buchanan, as Secretary of State, the right of voluntary expatriation was broadly asserted; and, during his Presidency, it was reannounced in the form in which it has since been affirmed, especially by the act of 1868.<sup>a</sup>

See Moore's American Diplomacy, chap. vii., on the Doctrine of Expatriation.

The idea of expatriation comprehends not merely the loss, but the change, of home and allegiance; it includes not only emigration, but naturalization.

Black, At. Gen., 1859, 9 Op. 356.

A citizen of the United States, whether native or naturalized, who expatriates himself and becomes a citizen of another country, can reacquire American citizenship only by complying with the laws relating to the naturalization of aliens.

Williams, At. Gen., 1873, 14 Op. 295; Mr. Fish, Sec. of State, to Mr. Carpenter, Feb. 5, 1873, 97 MS. Dom. Let. 407; Mr. Fish, Sec. of State, to Mr. Whiting, Feb. 6, 1873, 97 MS. Dom. Let. 427; Mr. Rives, Assist. Sec. of State, to Mr. Richards, May 23, 1888, 168 MS. Dom. Let. 441; Mr. Wharton, Act. Sec. of State, to Mr. Hirsch, min. to Turkey, July 10, 1891, For. Rel. 1891, 752; Mr. Olney, Sec. of State, to Mr. Weltner, Nov. 19, 1896, 214 MS. Dom. Let. 80; Mr. Hill, Assist. Sec. of State, to Mr. Navarro, Jan. 20, 1899, 234 MS. Dom. Let. 172.

"No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, divest

<sup>a</sup> *Infra*, § 435.

himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part."

Lord Grenville to Mr. King, Am. min., March 27, 1797, Am. State Papers, For. Rel. II. 148, 149.

The doctrine of perpetual allegiance was not applied by the British courts to persons born in the United States before, and remaining here after, the acknowledgment of their independence. (*Doe v. Acklam*, 2 B. & C. 779.) See *supra*, § 376.

"To the Lords of His Majesty's most Hon'ble Privy Council. May it please Your Lordships,

"In obedience to your Lordships' order of the 16th inst., referring to us the petition of John Montgomery, the representative of Simon Cook, and papers accompanying the same to your Lordships' order annexed, and requiring us to consider thereof, and report whether Alexander Smith, therein named, is to be considered according to the construction of His Majesty's order in council of 31st May, 1797, for regulating the trade between Great Britain and the Territories belonging to the United States of America, as a subject of the United States of America, and whether he is entitled to be master of a ship belonging to the said United States trading to this country and to confer on said ship the benefit of said order in council; We have considered the papers so referred to us and we are of opinion that Alexander Smith, being a natural born subject of His Majesty and not having been admitted a citizen of the United States of America until 6th May, 1796, cannot be considered with respect to this country as a citizen of the United States so as to entitle him to be a master of a ship belonging to the said United States trading to this country or to confer on such ship the benefit of said order of council. We apprehend this point was submitted to opinion of Sir Philip Yorke in 1732 in the case of a Scotchman who had been a Burgher of Stockholm and was master of a Swedish ship navigated with Swedish mariners; and that he thought this would not entitle the Scotchman to be considered as a Swede in Great Britain, his native country. All which we humbly submit to your Lordships' consideration.

"19th June 1797.

(Signed)

"WM. SCOTT.

"JNO. SCOTT.

"JNO. MITFORD."

MSS. Dept. of State.



## 2. JUDICIAL DECISIONS.

## (1) PRIOR TO 1868.

## § 432.

A brought an action against B in Pennsylvania. B objected to the jurisdiction of the court on the ground of Article XII. of the consular convention between the United States and France, under which all differences and suits between citizens of France in the United States or citizens of the United States in France were to be determined by consular officers. It appeared that A was a native of France, and resided in San Domingo at the period of the French Revolution. After the introduction of the republican system in France he came to America and took an oath of allegiance to the State of Pennsylvania under the act of March, 1789 (2 Dall. 676), and purchased a tract of land, on which he resided. That act was, however, at the time obsolete, and he was never naturalized under the act of Congress; but he was frequently heard to express his abhorrence of the condition of things in France, and he declared an intention to settle permanently in America. The supreme court of Pennsylvania held that he was not a citizen of France. It was true, said the court, that it did not appear that he had acquired rights of citizenship in the United States or in any other country; but he had an undoubted right to dissent from the revolution and to refuse allegiance to the new government and withdraw from the territory of France. Everything that could be said or done to manifest such a determination had been said and done by A, except the act of becoming a citizen or subject of another country. No argument seems to have been made on the law of France; but the court seems to have proceeded on the ground that the plaintiff was not, as the idea was expressed by counsel, "a citizen of the French Republic."

*Caignet v. Pettit*, supreme court of Pa. (1795), 2 Dallas, 234.

Edward Ballard, a native of Virginia, and a citizen and inhabitant of the United States, captured, while in command of *L'Ami de la Liberté*, an American-built vessel, owned by citizens of the United States, and unlawfully armed and equipped in the United States, but cruising under the pretended authority of France, a vessel and cargo belonging to citizens of the Netherlands. A question being raised as to Ballard's citizenship, it appeared that in April, 1794, he renounced, in the court of Isle of Wight county, his allegiance to Virginia and to the United States, under a Virginia statute of December 23, 1792, which provided that whoever should, in a prescribed form, declare that he relinquished the character of a citizen and should "depart out of" the commonwealth, should "from

the time of his departure" be "considered as having exercised his right of expatriation," and thenceforth "be deemed no citizen." He subsequently went on a cruise in the vessel in question, under a commission emanating from the French admiral, but did not become naturalized in any other country.

After his capture of the Dutch vessel, Ballard was assisted to bring her in by one Captain Talbot, of *L'Ami de la Point-a-Petre*. A question was raised as to Talbot's citizenship. A native of Virginia, he went late in 1793 to Point-a-Petre, island of Guadaloupe, where he took an oath of allegiance to the French Republic, and was naturalized by the municipality as a French citizen. He then sailed on a cruise in *L'Ami de la Point-a-Petre*. This vessel was American built, and was formerly called the *Fairplay*, under which name Talbot made his voyage in it to Guadaloupe. It then belonged to two American citizens, named Sinclair and Wilson, under a power of attorney from whom Talbot, after his arrival at Guadaloupe, sold the vessel to one Redick, a native citizen of the United States, who had just been naturalized at Point-a-Petre, on the same day as Talbot, as a citizen of the French Republic. They were naturalized three days before the sale. The sale having been made, the governor of Guadaloupe authorized Redick to send out the vessel as *L'Ami de la Point-a-Petre*, under Talbot's command.

As to Ballard's citizenship, Mr. Justice Paterson declared that he was a citizen of the United States; for, though he had "renounced his allegiance to Virginia, or declared an intention of expatriation, . . . yet he had not emigrated to, and become a subject or citizen of, any foreign kingdom or republic. He was domiciliated within the United States, from whence he had not removed and joined himself to any other country, settling there his fortune and family. From Virginia he passed into South Carolina, where he sailed on board the armed vessel called the *Ami de la Liberté*. He sailed from and returned to the United States without so much as touching at any foreign port during his absence. In short it was a temporary absence, and not an entire departure from the United States; an absence with intention to return. . . . Ballard was, and still is, a citizen of the United States; unless, perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times. . . . But what is conclusive on this head is that Ballard sailed from this country with an iniquitous purpose, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. . . . An act of illegality can never be construed into an act of emigration or expatriation. . . . The act of the legislature of Virginia does not apply. Ballard was a citizen of Virginia, and also of the United States. . . . Allegiance to a particular State is one thing; allegiance to the United States is another. Will it

be said that the renunciation of allegiance to the former implies or draws after it a renunciation of allegiance to the latter? The sovereignties are different; the allegiance is different; the right, too, may be different."

Mr. Justice Paterson expressed no opinion on the question whether Talbot and Redick were citizens of France, it appearing that in the capture in question Talbot, with his vessel, played the part of an accomplice or conspirator with Ballard, who was a citizen of the United States and not of France.

The question of Talbot's citizenship was discussed by Mr. Justice Iredell. "This involves," said Mr. Justice Iredell, "the great question as to the right of expatriation." He concurred in the view that a man "should not be confined against his will to a particular spot because he happened to draw his first breath upon it." But there was a difference of opinion "as to the proper manner of executing this right." Some held it to be "a natural, unalienable right in each individual," not subject to legislative restraint, but exercisable by every man at his "will and pleasure." From this opinion he must presume to differ. Expatriation was not "a natural right, in which the individual is to be considered as alone concerned." Every man had, as a member of society, duties as well as rights. If he had been in the exercise of a public trust, for which he had not fully accounted, he ought not to leave the society until he had done so. It was sometimes said that a man should not expatriate himself in time of war, so as to do a prejudice to his country. How could this be so, if expatriation was "a natural, unalienable right, upon the footing of mere private will?" The very statement of an exception in time of war plainly meant that it was not an absolute right, but "a reasonable and moral right which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must forever give way." But, who is to regulate the matter? "The legislature surely." And if it may exercise the power in time of war because the public safety may require it, it may do so in other instances on the same ground. The supposition that the power might be abused was of no importance, any more than the supposition that the taxing power might be abused. The assembly of Virginia had shown judicious foresight in attempting to regulate the matter. If the Virginia statute was still in force—a question he would not unnecessarily decide—he had no doubt that a citizen of that State could not expatriate himself in any other manner. It was probable from the record, but not certain, that Talbot was still a citizen of Virginia. But, however this might be, he was "undoubtedly . . . a citizen of the United States." In the absence of any law prescribing the method of expatriating himself as such, there must be some evidence that he had actu-

ally done it. His going to the West Indies and being admitted a citizen there, did not in itself constitute expatriation or discharge him from his obligations to his own country. If the laws of the United States had imposed restrictions on his leaving the country, no act of a foreign country could operate to repeal them. The act was complete, if he had legally quitted his own country; if not, it was subordinate to his original allegiance. The rights of citizenship bestowed by the United States on Lafayette, or by France on certain illustrious characters in the United States, did not absolve them from their original allegiance. Talbot's going to the West Indies and taking an oath of allegiance there was in itself an equivocal act. It might have been done with or without a view to relinquish his own country forever. "If the former, and this was clearly proved, it possibly might have the effect contended for. If the latter, it would show that he voluntarily submitted to the embarrassments of two distinct allegiances." By the treaty between the United States and Holland a citizen of either country cruising under a foreign privateer commission against the citizens of the other was to be deemed a pirate. If he left America and became a French citizen in order to have a color for so cruising, his acceptance of a French commission would in itself involve the perpetration of a crime. If he went to the West Indies intending to reside there for a time, and to act under a commission, believing that this would justify him, such a course, though it might excuse him from the guilt of piracy, would not make his contract lawful, "because, in this case, even his intention was not to *expatriate himself forever*; and, consequently, he still remained *an American citizen*, and had no authority to take a commission at all. It surely is impossible for us to say he meant a real expatriation, when his conduct *prima facie* as much indicates a crime as anything else." The evidence therefore did not show that Talbot had ceased to be an American citizen, so as to be absolved from the duties he owed to his country, and among others that "of not cruising against the Dutch, in violation of the law of nations generally, and of the treaty with Holland in particular."

On the same grounds Judge Iredell considered Redick still a citizen of the United States, there being nothing to show his expatriation "but a residence of no long duration, in a French island, his taking an oath to the French Republic, and being admitted a French citizen."

As to Ballard, Mr. Justice Iredell said: "Admitting him to have been expatriated (which, if the Virginia law was in force, I think he was), he did not become a French citizen at all. Only one of the crew was a Frenchman. I think all the rest were proved to be Americans or English. She was fitted out in the United States. The commission, if good at all, was of a temporary and secret nature, and seems to have been confined to a special purpose, to be executed within the United

States. She certainly had no authority to cruise, that being specified in every commission of that nature. Whoever were her owners, she does not appear to have been French property. On the contrary, there is the highest possibility that Talbot's and Ballard's vessels had the same owners. So conscious was he of the illegality of his conduct, that he even preferred no claim for the captured property."

Mr. Justice Cushing said:

"Even supposing that Talbot was, *bona fide*, a French citizen, the other circumstances of the case are sufficient to render the capture void. It was, in truth, a capture by Ballard, who had no authority, or color of authority, for his conduct. He was an American citizen; he had never left the United States; his vessel was owned by American citizens; and the commission, which he held by assignment, was granted by a French admiral, within the United States, to another person, for a particular purpose, but not for the purpose of capture. . . . On the important right of expatriation, I do not think it necessary to give an opinion; but the doctrine mentioned by Heineccius seems to furnish a reasonable and satisfactory rule. The act of expatriation should be *bona fide*, and manifested, at least, by the emigrant's removal, with his family and effects, into another country. This, however, forms no part of the ground on which I think the decree of the circuit court ought to be affirmed."

Rutledge, Chief Justice, said that it was not necessary to give an opinion upon the "doctrine of expatriation," there "being no proof that Captain Talbot's admission as a citizen of the French Republic was with a view to relinquish his native country; and a man may, at the same time, enjoy the rights of citizenship under two governments."

Talbot v. Janson (1795), 3 Dallas, 133.

See, also, Janson v. The Vrow Christina Magdalena, Bee's Adm. 11, 23.

Messrs. E. Tilghman, Lewis, and Reed (South Carolina), in their argument for the appellees, cited 2 Heineccius, B. II. c. 10, f. 230, p. 220, to the effect that the emigrant must, in order to expatriate himself, not only depart with that design, but must "join himself to another state."

In April, 1800, the American schooner *Jane*, flour-laden, sailed from Baltimore for St. Bartholomew's, where both vessel and cargo were to be sold. The cargo having been disposed of at St. Bartholomew's, the master, being unable to sell the vessel there, proceeded with her to St. Thomas, where he sold her to Jared Shattuck, who changed her name to the *Charming Betsy* and, having loaded her with American produce, cleared her as a Danish vessel for the French island of Guadaloupe. On this voyage she was captured by a French privateer and sent to Guadaloupe as a prize; but on the way

thither she was recaptured by Captain Murray, of the U. S. frigate *Constellation*, and carried into Martinique, where the master claimed both vessel and cargo as the property of Jared Shattuck, a Danish burgher. It appeared that Shattuck was born in Connecticut before the American Revolution, but was removed while an infant to St. Thomas, where he had continued to reside since about 1789, having married there, established himself in trade, and acquired vessels and real property. About 1796 he took an oath of allegiance to the Danish Crown, and became a Danish burgher, invested with the privileges of a Danish subject. Captain Murray, however, considering him as still an American citizen, sold the cargo at Martinique and brought the vessel to Philadelphia, where he libelled her under the act of February 27, 1800, entitled "An act further to suspend the commercial intercourse between the United States and France, and the dependencies thereof." (2 Stats. at L. 7.) This act provided that from and after March 2, 1800, "all commercial intercourse between any person . . . resident within the United States or under their protection," and any person resident in France or any of her dependencies, should be suspended; and that any vessel owned or employed "by any person . . . resident within the United States, or any citizen . . . thereof resident elsewhere," and sailing therefrom after that day, which, "contrary to the intent" of the statute, should be "voluntarily carried, . . . destined, or permitted to proceed, or . . . be sold, bartered, entrusted, or transferred for the purpose that she may proceed, whether directly or from any intermediate port or place," to France or any of her dependencies, and also any cargo which should be found on board of such vessel "when detected and interrupted in such unlawful purpose," should be wholly forfeited.

The act thus forbade commercial intercourse with France or her dependencies "by any person resident within the United States or under their protection," and made the vessel and cargo subject to forfeiture (1) if the vessel was owned or employed in intercourse with a French port or place "by any person resident within the United States or any citizen thereof resident elsewhere," or (2) if she was sold or transferred for the purpose that she might proceed to such port or place.

The court, Marshall, C. J., delivering the opinion, held:

1. That the building of vessels in the United States "for sale to neutrals" was a profitable business which Congress could not be supposed to have prohibited, unless the intent was plain.

2. That an act of Congress ought never to be construed to violate the law of nations if any other construction were possible, and consequently should not be construed to violate neutral rights or commerce.

3. That the *Jane*, "having been completely transferred in the

island of St. Thomas by a *bona fide* sale to Jared Shattuck, and the forfeiture alleged to have accrued on a fact subsequent to that transfer," the liability of the vessel to forfeiture must depend upon the inquiry whether the purchaser came within the description of the act, as a "citizen" of the United States "resident elsewhere."

4. That, whether a citizen of the United States could divest himself absolutely of that character, except in some manner prescribed by law, was a question not necessary to be decided; that it appeared by the precedents that an American citizen might "acquire in a foreign country the commercial privileges attached to his domicil, and be exempted from the operation of an act expressed in such general terms" as that under consideration; that Shattuck, having become "the subject of a foreign power," this fact, though it might not suffice "to rescue him from punishment for any crime committed against the United States, a point not intended to be decided," yet placed him "out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance," and took him "out of the description of the act."

5. That "the *Charming Betsy*, with her cargo, being at the time of her recapture the *bona fide* property of a Danish burgher," was not forfeitable for being employed in trade with a French island.

Murray v. Schooner *Charming Betsy* (1804), 2 Cranch, 64.

In a note to this case, p. 82, an opinion of Chief Justice Ellsworth is given, as extracted by Judge Tucker from *The National Magazine*, No. 3, p. 254. As stated, this opinion was delivered in the case of Isaac Williams, who was under trial in 1797 in the United States circuit court in Connecticut for accepting a French commission. In his defense he offered to prove that he had, prior to the war between England and France, expatriated himself and become a French citizen. Chief Justice Ellsworth is reported to have held (1) "that all the members of a civil community are bound to each other by compact," and (2) that "one of the parties to this compact can not dissolve it by his own act." A member of the community could not dissolve his compact with it without its consent or default. In the present case there had been no default, nor had there been any consent. The act of the Government in naturalizing foreigners did not imply such consent. No inquiry was made as to the applicant's relations to his own original country. If he embarrassed himself "by contracting contradictory obligations" the "fault and folly" were his own; but this implied no consent of the Government to the expatriation of its citizens. The evidence was therefore rejected, and the prisoner was found guilty, fined, and imprisoned.

Jared Shattuck, the owner of the *Charming Betsy*, claimed damages from Lieutenant Maley, commander of the U. S. vessel *Experiment*, for the capture of the schooner *Mercator* which, though built in the United States, belonged to Shattuck. It was held that the claim for damages was well founded. Marshall, C. J., delivering the opinion of the court, said that it had been shown that Shattuck had, though he was born in the United States, removed to St. Thomas and "ac-

quired all the commercial rights of his domicile before the occurrence of those circumstances which occasioned the acts of Congress," and that the case of the *Charming Betsy* determined that the vessel and cargo were not liable to forfeiture under those acts. (*Maley v. Shattuck* (1806), 3 Cranch, 458.)

C., a native of New Jersey, resided therein till some time in 1777, when he removed to Philadelphia and joined the British forces. He ever afterwards adhered to the British cause, and at the close of the American Revolution settled in London, where he always conducted himself as a British subject. Did he thereby become incapable, as an alien, of inheriting lands in New Jersey in 1802? It appeared that by an act of the legislature of New Jersey of October 4, 1776, it was declared that all persons abiding there not only owed allegiance to the State, but were also members of its existing government. By an act of June 5, 1777, a pardon was offered to such "subjects" of the State as had been seduced from their allegiance to it; and it was enacted that their *personal* estate should be forfeited unless they should return to their duty by August 1, 1777. Many of the persons intended to be affected having failed to return, a new act was passed April 18, 1778, under which the real as well as the personal estates of such persons were to be seized, the personalty to be sold and the realty to be rented out. By this act the persons in question were termed "offenders." December 11, 1778, yet another act was passed, by which the estates of the "fugitives and offenders" mentioned in the prior acts were declared forfeited; and by section 2 every inhabitant of the State who had joined the enemy between April 19, 1775, and October 4, 1776, and who had not since returned and become a subject in allegiance to the existing government by taking the oaths of abjuration and allegiance, was declared guilty of high treason. Held, Mr. Justice Cushing delivering the opinion, that as, by these laws of New Jersey, which were still in force and were not affected by the treaty of peace, C. was incapable of throwing off his allegiance to that State, he did not become an alien to it, but retained his capacity to take lands within its limits.

*McIlvaine v. Coxe's Lessee* (1808), 2 Cranch, 280, 4 Cranch, 209. This was an action of ejectment. In the course of the argument, Mr. Justice Paterson said: "Suppose he [C.] expatriated himself since the peace, what is the consequence? Does he thereby become a *complete alien*, so as not to be capable of taking lands by descent afterwards?" W. Tilghman, counsel for defendant, replied: "So I contend." Rawle, counsel for C., argued the matter upon the laws of New Jersey, maintaining that they were conclusive on the subject. W. Tilghman, as reported, admitted that by the laws of New Jersey C. was "to be considered as a subject of New Jersey by force; and that the State had a right to make such a law. He had argued only upon the general ground, independent of the law of New Jersey."



Article III. of the treaty between the United States and Würtemberg of April 10, 1844, provided that the "citizens or subjects" of each contracting party should have the power to dispose of their personal property within the jurisdiction of the other, and that their heirs, legatees, and donees, being "citizens or subjects" of the other contracting party, might take and dispose of such property, paying only such duties as would be paid in like cases by inhabitants of the country in which the property lay. It was held that this stipulation did not apply to property of a native subject of Würtemberg who, after having been naturalized as a citizen of the United States, died in Louisiana, bequeathing legacies to kindred residing in Würtemberg, the fact that he was formerly a subject of Würtemberg giving him no rights under the treaty.

*Frederickson v. Louisiana*, 23 How. 445.

(2) SINCE 1868.

§ 433.

The consent of government is not necessary to enable a citizen voluntarily to expatriate himself and become a citizen of another country.

*Green v. Salas*, 31 Fed. Rep. 106, and cases cited; *Comitis v. Parkerson*, 56 Id. 556; *Jennes v. Landes*, 84 Id. 73; *In re Look Tin Sing*, 10 Sawyer C. C. 353; *Browne v. Dexter*, 66 Cal. 39.

3. GOVERNMENTAL DOCTRINE.

(1) EXECUTIVE UTTERANCES DOWN TO 1845.

§ 434.

"Our citizens are certainly free to divest themselves of that character by emigration and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do."

Mr. Jefferson, Sec. of State, to Mr. G. Morris, Aug. 16, 1793, 4 Jeff. Works (Washington's ed.), 37.

A claim was presented by certain persons in the character of American citizens to the mixed commission under Article XXI. of the treaty between the United States and Spain of October 27, 1795. An award in favor of the claimants was made by a majority of the commission, but the Spanish commissioner declined to sign it on the ground that the claimants, who were British subjects by birth, were not citizens of the United States at the time of the acknowledgment of independence by Great Britain. The Spanish Government suspended

payment of the award because the Spanish commissioner had not signed it. The United States protested against the action of the Spanish Government, saying: "The persons who claim were, not only when the treaty was made, but also when the injury was sustained, according to our laws citizens of the United States. . . . The right of naturalizing aliens is claimed and exercised by the different nations of Europe, as well as by the United States. When the laws adopt an individual no nation has a right to question the validity of the act, unless it be one which may have a conflicting title to the person adopted. Spain therefore cannot contest the fact that these gentlemen are American citizens."

Mr. Marshall, Sec. of State, to Mr. Humphreys, Sept. 23, 1800, Moore, Int. Arbitrations, II. 1001; MS. Inst. U. States Ministers, V. 383. See remarks of Nott, C. J., in *The Conrad* (1902), 37 Ct. Cl. 459.

"Your proffered exertions to procure the discharge of native American citizens from on board British ships of war, of which you desire a list, has not escaped attention. It is impossible for the United States to discriminate between their native and naturalized citizens, nor ought your Government to expect it, as it makes no such discrimination itself. There is in this office a list of several thousand American seamen, who have been impressed into the British service, for whose release applications have from time to time been already made; of this list a copy shall be forwarded you, to take advantage of any good offices you may be able to render."

Mr. Monroe, Sec. of State, to Mr. Foster, British minister, May 30, 1812. Am. State Papers, For. Rel. III. 454.

The British Government, during the war of 1812, refused in a number of cases to treat persons who, though born in Great Britain, had been naturalized in the United States, as prisoners of war, transferring them to prisons and rejecting proposals for their exchange. The action of the Government of the United States in this relation is given in Am. State papers, For. Rel. III. 630. As to expatriation, as involved in the question of impressment, see Adams' Hist. of the United States, II. 332-339; *supra*, § 317.

"It is known that almost all seamen in the service of Colombia are foreigners, and many of them citizens of the United States, enlisted in the Colombian service in violation of the laws of their own country. . . . By the present constitution of Colombia, the rights of citizenship are confined to natives of the territory and their children, landholders at the commencement of the revolution who have adhered to the cause of independence, and strangers after obtaining letters of naturalization. You will ascertain how these letters of naturalization are obtained. If they are granted, of course, to every sailor who enlists in their service, you will take some proper occasion to represent that this system interferes with the rights of

other nations; and that although the United States freely admit the right of their native citizens to expatriate themselves, yet they cannot admit the exercise of that right by the violation of their laws or of the contracts of the expatriated individuals with others of their citizens."

Mr. J. Q. Adams, Sec. of State, to Mr. Anderson, May 27, 1823, MS. Inst. to U. S. Ministers, IX. 274, 303.

"I transmit the passports requested in your letter of the 9th instant, for Mr. Charles Brundock and Jasper Christianson, and return their certificates of naturalization. You will please have the blanks filled up with the description of their persons and transmit a copy thereof to this Department. Whether those persons, upon returning to the countries within whose allegiance they were born, will be liable to perform military duty, will depend upon the laws of those countries respectively, and upon circumstances [on] which this Department is not willing to express an opinion in anticipation."

Mr. Forsyth, Sec. of State, to Mr. Strobecker, April 15, 1835, 27 MS. Dom. Let. 310.

John Philipp Knoche, a native of Prussia, emigrated to the United States in 1834, being then twenty-one years of age. He remained in the United States six years and became a naturalized citizen, and then returned to Prussia, where he was compelled to enter the army. He applied to the American legation at Berlin for its interposition. Mr. Henry Wheaton, who was then American minister to Prussia, replied: "It is not in my power to interfere in the manner you desire. Had you remained in the United States or visited any other foreign country (except Prussia) on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicil and national character revert* (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated."

Mr. Wheaton, min. to Prussia, to Mr. Knoche, July 24, 1840, enclosed with Mr. Wheaton's No. 157, to Mr. Forsyth, Sec. of State, July 29, 1840, S. Ex. Doc. 38, 36 Cong. 1 sess. 6, 7.

Replying to a complaint of the Mexican Government that the revolution in Texas was aided by persons from the United States, Mr. Webster said: "These persons, so far as is known to the Government of the United States, repair to Texas, not as citizens of the United States, but as ceasing to be such citizens, and as changing, at the same

time, their allegiance and their domicile. . . . The Government of the United States does not maintain, and never has maintained, the doctrine of the perpetuity of natural allegiance. And surely Mexico maintains no such doctrine; because her actually existing government, like that of the United States, is founded in the principle that men may throw off the obligation of that allegiance to which they are born. . . . Mexico herself has laws granting equal facilities [with those of the United States] to the naturalization of foreigners. On the other hand, the United States have not passed any law restraining their own citizens, native or naturalized, from leaving the country and forming political relations elsewhere. Nor do other Governments in modern times attempt any such thing. It is true that there are Governments which assert the principle of perpetual allegiance; yet, even in cases where this is not rather a matter of theory than of practice, the duties of this supposed continuing allegiance are left to be demanded of the subject himself, when within the reach of the power of his former Government, and as exigencies may arise, and are not attempted to be enforced by the imposition of previous restraint, preventing men from leaving their country."

Mr. Webster, Sec. of State, to Mr. Thompson, min. to Mexico, July 8, 1842.  
6 Webster's Works, 445, 454.

"The Government of the United States have no power to extend protection to naturalized citizens who voluntarily return to their native country." (Mr. Webster, Sec. of State, to Mr. Bryan, March 21, 1843,  
33 MS. Dom. Let. 117.)

"From these provisions [of the naturalization laws] it would seem, by necessary implication, that our laws presuppose a right on the part of citizens and subjects of foreign powers to expatriate themselves and transfer their allegiance, and, although the abstract right has not to my knowledge been settled by any authoritative decision, I feel no difficulty in expressing the opinion that the United States, acting upon these principles in reference to the citizens and subjects of other countries, would not deny their application to cases of naturalization of their own citizens by foreign powers, and, of course, to the case of Demerlier, who, if he should be naturalized by France, would, on this view of the subject, be absolved from his allegiance to the United States."

Mr. Calhoun, Sec. of State, to Mr. Pageot, French min., Nov. 30, 1844, MS.  
Notes to French Leg. VI. 84.

## (2) MR. BUCHANAN'S ASSERTION OF UNQUALIFIED RIGHT.

## § 435.

"The fact of your having become a citizen of the United States has the effect of entitling you to the same protection from this Government that a native citizen would receive."

Mr. Buchanan, Sec. of State, to Mr. Rosset, Nov. 25, 1845, 35 MS. Dom. Let. 330.

"The Government of the United States affords equal protection to all our citizens, whether naturalized or native, and this Department makes no distinction between the one and the other in granting passports.

"It is right to inform you, however, that difficulties have arisen in cases similar to yours. In more than one instance European governments have attempted to punish our naturalized citizens, who had returned to their native country, for military offences committed before their emigration. In every such case the Government has interposed, I believe successfully, for their relief; but still they have in the meantime been subjected to much inconvenience. Under these circumstances I could not advise you to incur the risk of returning to Oldenburg, if the business which calls for your presence there can be transacted by any other person."

Mr. Buchanan, Sec. of State, to Mr. Huesman, March 10, 1847, 36 MS. Dom. Let. 200.

"A native of the island of Cuba, who has been naturalized in the United States, retains his rights as an American citizen upon his return to that island, at least until he has manifested, by unequivocal acts, his intention to become again a Spanish subject."

Mr. Buchanan, Sec. of State, to Mr. Campbell, consul at Havana, July 26, 1848, 10 MS. Desp. to Consuls, 473.

"Whenever the occasion may require it, you will resist the British doctrine of perpetual allegiance, and maintain the American principle that British native-born subjects, after they have been naturalized under our laws, are, to all intents and purposes, as much American citizens, and entitled to the same degree of protection, as though they had been born in the United States."

Mr. Buchanan, Sec. of State, to Mr. Bancroft, min. to England, Oct. 28, 1848, 47 Brit. & For. State Pap. 1236, 1237.

"Our obligation to protect both these classes [naturalized and native American citizens] is in all respects equal. We can recognize no difference between the one and the other, nor can we permit this to

be done by any foreign government, without protesting and remonstrating against it in the strongest terms. The subjects of other countries who, from choice, have abandoned their native land, and, accepting the invitation which our laws present, have emigrated to the United States and become American citizens, are entitled to the very same rights and privileges, as if they had been born in the country. To treat them in a different manner, would be a violation of our plighted faith, as well as of our solemn duty."

Mr. Buchanan, Sec. of State, to Mr. Bancroft, min. to England, Dec. 18, 1848, 47 Brit. & For. State Pap. 1241, 1243.

For the reply of Lord Palmerston, Aug. 16, 1849, to protests made by Mr. Bancroft in accordance with his instructions, see S. Ex. Doc. 38, 36 Cong. 1 sess. 167.

### (3) REVERSION TO EARLIER DOCTRINE.

#### § 436.

Replying to an inquiry whether Mr. Victor B. Depierre, a native of France, but a naturalized citizen of the United States, could "expect the protection of this Government in that country, when proceeding thither with a passport" from the Department of State, Mr. Webster said: "If, as is understood to be the fact, the Government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction."

Mr. Webster, Sec. of State, to Mr. Nones, June 1, 1852, S. Ex. Doc. 38, 36 Cong. 1 sess. 55; 40 MS. Dom. Let. 162.

To the same effect, see Mr. Webster, Sec. of State, to Mr. Tolen, June 25, 1852, 40 MS. Dom. Let. 204.

"The doctrine of inalienable allegiance is no doubt attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State courts; but the naturalization laws of the United States certainly assume that a person can, by his own acts, divest himself of the allegiance under which he was born, and contract a new allegiance to a foreign power. But, until this new allegiance is contracted, he must be considered as bound by his allegiance to the government under which he was born, and subject to its laws; and this undoubted principle seems to have its direct application in the present cases.

"The Prussian Government requires of all its subjects a certain amount of military service. However onerous this requirement may be, it is purely a matter of domestic policy, in which no foreign government has a right to interfere. It appears that there is no exemption from the obligation to render this service in favor of persons

wishing to leave the country, unless they apply for and receive from the proper authorities what is termed 'a certificate of emigration.' This 'emigration certificate' seems, like an ordinary passport, to be granted as a matter of course on application. When the vast extent of the Prussian military establishment is considered, and its importance in the monarchy, such a regulation, in reference to persons wishing to emigrate, who, as you are aware, now amount to many thousands annually, can not be regarded as otherwise than liberal. But even if a different system prevailed, and if the previous rendition of a certain amount of military duty were made the condition *sine qua non* of granting the 'emigration certificate,' however oppressive the rule might be, a foreign government could have no right to interfere with its execution.

"If, then, a Prussian subject, born and living under this state of law, chooses to emigrate to a foreign country without obtaining the 'certificate' which alone can discharge him from the obligation of military service, he takes that step at his own risk. He elects to go abroad under the burden of a duty which he owes to his Government. His departure is of the nature of an escape from her laws, and if, at any subsequent period, he is indiscreet enough to return to his native country, he can not complain if those laws are executed to his disadvantage. His case resembles that of a soldier or sailor enlisted by conscription, or other compulsory process, in the army or navy. If he should desert the service of his country, and thereby render himself amenable to military law, no one would expect that he could return to his native land and bid defiance to its laws, because in the meantime he might have become a naturalized citizen of a foreign state."

Mr. Everett, Sec. of State, to Mr. Barnard, min. to Prussia, Jan. 14, 1853, S. Ex. Doc. 38, 36 Cong. 1 sess. 53-54; MS. Inst. Prussia, XIV. 196.

With this instruction, Mr. Everett enclosed a copy of the letter of Mr. Webster to Mr. Nones, June 1, 1852, *supra*, and stated that his view was the same as that taken by Mr. Webster. (Id. 199.)

With reference to his instructions to Mr. Barnard, Mr. Everett stated that the "whole subject" was "specially submitted" to him "for decision," and that "it was determined after mature consideration, with the sanction of the President." (Mr. Everett, Sec. of State, to Mr. Fuller, M. C., March 2, 1853, 41 MS. Dom. Let. 306.)

In the case of Mr. Grill, a naturalized citizen of the United States, whose property at Hamburg was attached by the government of that city because of his failure to perform military service, Mr. Everett said: "This would seem to be a judicial question, to be decided by the courts of Hamburg pursuant to the 7th and 8th articles of the treaties between the United States and the Hanse Towns of the 20th December, 1827." (Mr. Everett, Sec. of State, to Mr. Hall, M. C., Dec. 15, 1852, 41 MS. Dom. Let. 144.)

"With reference to our verbal conversation, some days ago, in relation to the liabilities to which emigrants from Prussia and other German States, who have become citizens of the United States, are subjected when they voluntarily return to those States, after having left their native country without the necessary permission of emigration, and without fulfilling their military duties prescribed by law after having attained a certain age, I beg leave to inclose hereby an extract from the laws of Prussia and from the constitution of Prussia on this subject, by which you will perceive that Prussia does not pretend to enforce any allegiance upon the said emigrants, but that, if they return to Prussia, they are made responsible for having violated our laws in the cases above mentioned and are considered as criminals forfeited to the punishment of the law, from which no citizenship of any nation can liberate them."

Baron Gerolt, Prussian min., to Mr. Marcy, Sec. of State, July 11, 1853, S. Ex. Doc. 38, 36 Cong. 1 sess. 70.

The extract enclosed by Baron Gerolt was from the laws of Prussia of December 31, 1842, and from the Prussian constitution of 1850. By the former (§ 15) the quality of a Prussian subject was lost (1) by discharge upon the subject's request, (2) by sentence of the competent authority, (3) by living ten years in a foreign country, (4) by the marriage of a Prussian female with a foreigner; but, by other provisions of the law, as well as by the constitution, the permission to emigrate as well as the discharge from allegiance was subject to the performance of the duties of military service.

"Prussia . . . claims the right to exact military service from her subjects who have emigrated to or have been naturalized in other countries without having procured a certificate of emigration, and she has in many instances enforced the performance of that duty upon those who have returned to that country. The interposition of the Government of the United States in behalf of such as were naturalized in this country has not been effectual in inducing her to forego this claim." (Mr. Marcy, Sec. of State, to Mr. Bielfeld, July 6, 1853, 41 MS. Dom. Let. 442.)

"This Government cannot rightfully interpose to relieve a naturalized citizen from the duties or penalties which the laws of his native country may impose upon him on his voluntary return within its limits. When a foreigner is naturalized the Government does not regard the obligations he has incurred elsewhere, nor does it undertake to exempt him from their performance. He is admitted to the privileges of a citizen in the country, and to the rights which our treaties and the law of nations secure to American citizens abroad. In this respect he has all the rights of a native-born citizen, but the vindication of none of these rights can require or authorize an interference in his behalf with the fair application to him of the municipal laws of his native country when he voluntarily subjects himself to their control in the same manner and to the same extent



as they would apply if he had never left that country. A different view of the duties of this Government would be an invasion of the independence of nations, and could not fail to be productive of discord; it might, moreover, prove detrimental to the interests of the States of this Union."

Mr. Marcy, Sec. of State, to Mr. Daniel, min. to Sardinia, Nov. 10, 1855, MS. Inst. Italy, I. 88.

See, also, Mr. Marcy, Sec. of State, to Mr. Meyer, May 16, 1853, 41 MS. Dom. Let. 392; to Mr. Bielfeld, July 6, 1853, id. 442; to Mr. Kinman, April 8, 1854, 42 id. 353; to Mr. Wendell, Sept. 7, 1854, 43 id. 102; to Mr. Campbell, Sept. 8, 1854, S. Ex. Doc. 38, 36 Cong. 1 sess. 189.

In 1856 the Department of State submitted to Mr. Cushing, as Attorney-General, the following question propounded by the Bavarian minister at Berlin: "Whether, according to the laws of the United States of America, a citizen thereof, when he desires to expatriate himself, needs to ask either from the Government of the United States, or of the State of which he is the immediate citizen, permission to emigrate; and if so, what are the penalties of contravention of the law?"

Mr. Cushing, after adverting to the fact that the National Government had not undertaken to formalize any general law either of citizenship or of emigration, referred to the laws of Virginia, which required, he said, as conditions of the relinquishment of citizenship, (1) a solemn declaration of intention to emigrate, with actual emigration, and (2) the assumption in good faith of a foreign allegiance, but declared (3) that the act of expatriation should have no effect if done while the State or the United States was at war with a foreign power; nor could a citizen of Virginia by emigration discharge himself from any obligation to the State, the nonperformance of which involved by its laws any penal consequence. Kentucky, said Mr. Cushing, had substantially similar laws; but no other State, so far as his observation went, had attempted to solve such questions by express legislation. The constitutions of Pennsylvania and Indiana declared that emigration from those States should not be prohibited, but it was undoubtedly the case, said Mr. Cushing, that military desertion could not be covered up under the cloak of emigration. Mr. Cushing thought that the Federal Government recognized the same principle, and cited to that effect the letter of Mr. Jefferson to Mr. Morris, August 16, 1793, *supra*, § 434, to the effect that the laws "do not admit that the bare commission of a crime amounts, of itself, to a divestment of the character of citizen, and withdraws the criminal from their coercion." Mr. Cushing then examined several decisions of the Federal and State courts, the results of which he summarized thus: "Expatriation a general right, subject to regulation of time and circumstance according to

public interests; and the requisite consent of the State presumed where not negatived by standing prohibitions." In conclusion, he expressed the opinion that, subject to "the conditions thus indicated," and to "such others as the public interest might seem to Congress to require to be imposed," "the right of expatriation exists, and may be freely exercised by the citizens of the United States."

Mr. Cushing, At-Gen., Oct. 31, 1856, 8 Op. 139.

In the course of his opinion, at p. 163, Mr. Cushing said: "In truth, opinion in the United States has been at all times a little colored on the subject by necessary opposition to the assumption of Great Britain to uphold the doctrine of indefeasible allegiance, and in terms to prohibit expatriation. Hence we have been prone to regard it hastily as a question between kings and their subjects. It is not so. The true question is of the relation between the political society and its members, upon whatever hypothesis of right, and in whatever form of organization, that society may be constituted.

"The assumption of a natural right of emigration, without possible restriction in law, can be defended only by maintaining that each individual has all possible rights against the society, and the society none with respect to the individual; that there is no social organization, but a mere anarchy of elements, each wholly independent of the other, and not otherwise consociated save than by their casual coexistence in the same territory. (Ahrens, *Droit Naturel*, p. 324.)"

The Bavarian minister at Berlin subsequently asked for an explanation of Mr. Cushing's opinion, with reference to the specific case of a native of Bavaria who came to the United States and was naturalized but afterwards returned to Bavaria and sought to recover his status as a Bavarian subject. The Bavarian authorities suspended action pending an inquiry whether he might throw off his allegiance to the United States, and if so, in what manner it was to be done. Attorney-General Black replied that there was no law of the United States which prevented either a native or naturalized citizen "from severing his political connection with this Government, if he sees proper to do so, in time of peace, and for a purpose not directly injurious to the interests of the country. There is no *mode* of renunciation prescribed." (Black, At-Gen., Aug. 17, 1857, 9 Op. 62.)

(4) REASSERTION OF UNQUALIFIED RIGHT, 1857-1861.

§ 437.

In notes of October 23, 1858, and March 16, 1859, Mr. Schleiden, the representative of Bremen at Washington, solicited the views of the Department of State concerning the possible surrender by his Government to other German States, under treaties with the latter, of persons from whom, as natives of such States, military service might be claimed, although they had been naturalized in the United States. The Department of State, in reply, took the ground that the question involved was political in its nature, and as such should be left to the

determination of the parties concerned, and should not be decided by a third state, such as Bremen, by the delivery up of the person demanded. In the course of its reply, the Department of State said: "It is undoubtedly true that this Government has acquiesced in the opinion expressed by Mr. Wheaton that, when a citizen who has been liable to military duty leaves his own country without permission, and without having performed this duty, and is naturalized in another country, he may be held to discharge his liability whenever he is found again in his native state. This opinion, however, is regarded by this Government as applying not to cases of inchoate liability, but to cases only where the liability has become complete. To speak of a minor as liable to military service simply because, if he should live long enough in the country, he might become so, could not be fairly regarded as either appropriate or just. It is unnecessary, however, to discuss this distinction with reference to your letter, because your inquiry refers to a case of admitted liability."

Mr. Cass, Sec. of State, to Mr. Schleiden, April 9, 1859, S. Ex. Doc. 38, 36 Cong. 1 sess. 195.

See, also, Mr. Schleiden to Mr. Cass, Nov. 28, 1859; Mr. Cass to Mr. Schleiden, Jan. 26, 1860, S. Ex. Doc. 38, 36 Cong. 1 sess. 211, 222.

"The position of the United States, as communicated to the minister at Berlin for the information of the Prussian Government, is that native-born Prussians naturalized in the United States and returning to the country of their birth are not liable to any duties or penalties, except such as were existing at the period of their emigration. If at that time they were in the army or actually called into it, such emigration and naturalization do not exempt them from the legal penalty which they incurred by their desertion, but this penalty may be enforced against them whenever they shall voluntarily place themselves within the local jurisdiction of their native country, and shall be proceeded against according to law. But when no present liabilities exist against them at the period of their emigration, the law of nations, in the opinion of this Government, gives no right to any country to interfere with naturalized American citizens, and the attempt to do so would be considered an act unjust in itself and unfriendly towards the United States. This question can not, of course, arise in the case of a naturalized citizen who remains in the United States. It is only when he voluntarily returns to his native country that its local laws can be enforced against him."

Mr. Cass, Sec. of State, to Mr. Hofer, June 14, 1859, 50 MS. Dom. Let. 389. In an instruction to the American minister at Berlin, to which the foregoing letter refers, Mr. Cass said: "If the future liability to do military duty creates a perpetual obligation wherever the party may be, and whatever other responsibilities he may have incurred, the same principle will enable a Government to prevent its subjects or citi-

zens from ever leaving its dominions or changing their home. It would be a practical denial of all right of expatriation, and a full assertion of the doctrine of perpetual allegiance." (Mr. Cass, Sec. of State, to Mr. Wright, min. to Prussia, May 12, 1859, MS. Inst. Prussia XIV. 274.)

With reference to his letter to Mr. Hofer of the 14th of June, Mr. Cass said: "The proper application of this principle to cases as they arise depends on the existing facts, and it is not the practice of the Department to anticipate such cases and pronounce its opinion upon them in advance." (Mr. Cass, Sec. of State, to Mr. Peebles, June 21, 1859, 50 MS. Dom. Let. 417.)

See, also, Mr. Cass, Sec. of State, to Mr. Cushing, June 16, 1859; to Mr. Osterle, June 24, 1859: 50 MS. Dom. Let. 404, 427.

Christian Ernst, a native of Hanover, emigrated to the United States in 1851, when nineteen years of age. In February, 1859, he was naturalized, and in the following month procured a passport and went back to Hanover on a visit. After arriving in his native village he was arrested and forced into the Hanoverian army. President Buchanan submitted the case to Attorney-General Black for an opinion. Attorney-General Black advised (1) that the course to be taken must depend "upon the law of our own country, as controlled and modified by the law of nations;" (2) that it was the "natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose," and to throw off his natural allegiance and substitute another in its place; (3) that, although the common law of England denied this right, and "some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion," this was not to be taken as settling the question; (4) that "natural reason and justice," "writers of known wisdom," and "the practice of civilized nations" were all "opposed to the doctrine of perpetual allegiance," and that the United States was pledged to the right of expatriation and could not without perfidy repudiate it; (5) that expatriation "includes not only *emigration* out of one's native country, but *naturalization* in the country adopted as a future residence;" (6) that "naturalization does *ipso facto* place the native and the adopted citizen in precisely the same relations with the government under which they live, except in so far as the express and positive law of the country has made a distinction in favor of one or the other;" (7) that, with regard to the protection of American citizens in their rights at home and abroad, there was no law that divided them into classes or made any difference whatever between them; (8) that the opinion held by "persons of very high reputation" that a naturalized citizen ought to be protected everywhere except in the country of his birth had "no founda-

Case of Christian  
Ernst.

tion to rest upon . . . except the dogma which denies altogether the right of expatriation without the consent of his native country;" (9) that the naturalization laws were opposed to this view "in their whole spirit as well as in their express words," and that the states of Europe were "also practically committed against it;" (10) that, assuming that Hanover had a municipal regulation by which the right of expatriation was denied to those of her subjects who failed to comply with certain conditions, and assuming that this regulation was violated by Mr. Ernst when he came away, the unlawfulness of his emigration would not make his naturalization void as against the King of Hanover; (11) that, if the laws of the two countries were in conflict, the law of nations must decide the question upon principles and rules of its own, and that "by the public law of the world we have the undoubted right to naturalize a foreigner, whether his natural sovereign consented to his emigration or not;" and, finally, (12) that the Hanoverian Government could justify the arrest of Mr. Ernst only by proving that the original right of expatriation depended on the consent of the natural sovereign—a proposition which, said Mr. Black, "I am sure no man can establish."

Black, At. Gen., July 4, 1859, 9 Op. 356.

The views of the President in relation to the case of Christian Ernst and analogous cases were communicated to the American minister at Berlin, July 8, 1859. In this communication the position was maintained that the right of expatriation could not be doubted or denied in the United States; that the Constitution recognized it by conferring on Congress the power to establish a uniform rule for naturalization; that Congress had uniformly acted upon the principle since the commencement of the Federal Government, and that there was no country in Europe whose laws did not authorize the naturalization of foreigners in some form. What right, then, it was asked, did the laws of the United States confer upon a foreigner by granting him naturalization? The answer was, all the rights, privileges, and immunities which belonged to a native citizen, except that of eligibility to the office of President. "With this exception," it was affirmed, "the naturalized citizen, from and after the date of his naturalization, both at home and abroad, is placed upon the very same footing with the native citizen. He is neither in a better nor a worse condition. . . . The moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character, than if he had been born in the United States. Should he return to

his native country, he returns as an American citizen, and in no other character. In order to entitle his original government to punish him for an offence, this must have been committed while he was a subject and owed allegiance to that government. . . . It must have been of such a character that he might have been tried and punished for it at the moment of his departure." It was further maintained that by the treaty with Hanover, which provided that the "inhabitants" of each country should be permitted to sojourn in all parts of the other, submitting to the laws, every inhabitant of the United States had a right to visit that country and sojourn there in the prosecution of his business, and that no distinction could be made in this regard between a native and a naturalized citizen of the United States.

Mr. Cass, Sec. of State, to Mr. Wright, min. to Prussia, July 8, 1859, S. Ex. Doc. 38, 36 Cong. 1 sess. 132.

In the foregoing instruction a clear distinction was drawn between the case of a person who had committed an offence before emigration, and a person whose offence was alleged to have been committed after emigration. In this relation, the instruction said: "If a soldier or a sailor were to desert from our army or navy, for which offence he is liable to a severe punishment, and after having become a naturalized subject of another country, should return to the United States, it would be a singular defence for him to make that he was absolved from his crime because after its commission he had become a subject of another government. . . . During the last war with Great Britain, in several of the States, I might mention Pennsylvania in particular, the militiaman who was drafted and called into the service was exposed to a severe penalty if he did not obey the draft and muster himself into the service, or in default thereof procure a substitute." In such a case it was not possible to imagine that if an individual, after incurring the penalty, had gone to a foreign country and become naturalized, and then returned to Pennsylvania, the arm of the State authorities would have been paralyzed. (Id. 135-136.)

Mr. Wright was instructed to demand the immediate discharge of Ernst from his compulsory service, and full reparation for whatever injury he had suffered, either in person or in property. August 20, 1859, the Hanoverian Government stated that a "full pardon" had been granted to Ernst and that he had been "dismissed" from the military service. The Hanoverian Government added, however, that similar conflicts could be prevented in the future only by the United States "renouncing its own views on the subject, which do not agree with international relations," or by concluding a special arrangement. (Id. 145-146.)

See, also, Mr. Cass, Sec. of State, to Mr. Wright, Dec. 9, 1859, id. 147, and Mr. Cass, Sec. of State, to Mr. Mason, min. to France, June 27, 1859, id. 198.

The instruction to Mr. Wright was printed and issued in circular form as expressing the views of the United States. (Mr. Cass, Sec. of State, to Mr. Pugh, M. C., Feb. 1, 1860, 51 MS. Dom. Let. 418; Mr. Appleton, Assist. Sec. of State, to Mr. Weldman, April 26, 1860, 52 id.

188; Mr. Trescott, Asslt. Sec. of State, to Mr. Salsbacher, Aug. 24, 1860, 53 id. 47; Mr. F. W. Seward, Asslt. Sec. of State, to Mr. Roasen, April 6, 1861, 53 id. 542.)

"I have the honor herewith to transmit a copy of a despatch of the 22d ultimo, from the consul-general of the United States at Havana to this Department, on the subject of a recent order issued by the governor of Sagua la Grande, summoning a naturalized citizen of the United States, temporarily residing at that place, to surrender himself at the barracks for military duty. It appears that Mr. Leaña, the individual alluded to, who is a native of Spain, answered the summons of the governor and exhibited to him his certificate of naturalization, with other proofs of his American citizenship, notwithstanding which, however, he was ordered either to go to the barracks for the performance of the military service exacted of him, or give bond in the penalty of \$318 as indemnity for the nonperformance of such service. To escape being sent to prison, he executed the bond under protest. . . .

"You are requested to call the attention of the Government of Her Catholic Majesty without delay to this case, as one in which much interest is felt by the President, involving as it does the claim of a foreign government to interfere with the personal security and liberty of citizens of the United States whose interests may require them to return temporarily to the respective countries of which they were once inhabitants. This claim, which, as you are aware, is denied by the Government of the United States, has in all recent cases been yielded without hesitation upon representation of the views of this Government respecting it. These views are given at length in a despatch of the 8th of July last, addressed to Mr. Wright, at Berlin, a printed copy of which you will receive by the next mail.

"Fortunately such cases as the one in question are not likely to be of frequent occurrence, and the President indulges the confident hope that the Government of Her Catholic Majesty will at once direct its authorities in Cuba to put a stop to all future proceedings against Mr. Leaña, and at the same time take such measures as may prevent the recurrence of similar proceedings, so likely to interrupt the friendly relations of the two countries."

Mr. Cass, Sec. of State, to Mr. Preston, min. to Spain, March 1, 1860, MS. Inst. Spain, XV. 235.

"Our Government is bound to protect the rights of our naturalized citizens everywhere to the same extent as though they had drawn their first breath in this country. We can recognize no distinction between our native and naturalized citizens."

President Buchanan, annual message, Dec. 3, 1860, Richardson's Messages, V. 641.

## (5) COURSE DURING CIVIL WAR.

## § 438.

“Recurring to your despatch No. 8, which has already been acknowledged, I have now the honor to give you the President’s views in regard to the proceedings in Prussia, by which natives of Prussia who have voluntarily exchanged allegiance from that Government for the rights and privileges of citizens of the United States, and have been duly naturalized as such, are nevertheless arrested and held liable to perform military service on occasions of their transient visits to their native country. The question involved in these proceedings is an old one, and was a subject of elaborate discussion between the two countries before the occurrence of our late civil war. Considerations of ease and policy prevailed with this Department to allow the subject to rest during the continuance of the war. We became even less anxious upon the subject when it was seen that worthless naturalized citizens fled before the requirement of military service by their adopted Government here, and not only took refuge from such service in their native land, but impertinently demanded that the United States should interpose to procure their exemption from military service exacted there. Those circumstances, however, have passed away, and the question presents itself in its original form. The United States have accepted and established a Government upon the principle of the rights of men who have committed no crime to choose the state in which they will live, and to incorporate themselves as members of that state, and to enjoy henceforth its privileges and benefits, among which is included protection. This principle is recommended by sentiments of humanity and abstract justice. It is a principle which we cannot waive. It is not believed that the military service which can be procured by any foreign state in denial of this principle can be important or even useful to that state. The President desires that you will present the subject to the serious consideration of Count Bismarck. In doing so, you will assure the minister for foreign affairs that we are animated by sentiments of sincere friendship and good will to Prussia, and that therefore we shall be ready to receive and consider with candor any opinions upon the subject that the Prussian Government may think proper to communicate.

“You will also assure Count Bismarck that any suggestions that he may think proper to make relative to the extradition laws of the two countries will receive just and friendly attention.”

Mr. Seward, Sec. of State, to Mr. Wright, min. to Prussia, Dec. 2, 1865, Dip. Cor. 1865, III. 68; MS. Inst. Prussia, XIV. 422.



"The question with regard to the right of a foreign government to claim and enforce military service from such of its subjects as may voluntarily placed themselves within its jurisdiction after having become citizens of the United States is still a matter of controversy." (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Haurer, March 20, 1861, 53 MS. Dom. Let. 491.)

The "general views, however, . . . of the Executive Government in regard to the impressment of naturalized citizens into the military service of foreign countries, are expressed in the instruction of my predecessor of the 8th of July, 1859, to Mr. Wright, the United States minister at Berlin, a copy of which is enclosed." (Mr. Seward, Sec. of State, to Mr. Kind, March 18, 1863, 60 MS. Dom. Let. 27.)

See Mr. Seward, Sec. of State, to Mr. Judd, min. to Prussia, No. 27, April 3, 1862, MS. Inst. Prussia, XIV. 348.

"In view of the present condition of the Union, it is deemed inexpedient to instruct you to institute proceedings for obtaining the exemption of William Lade, Augustus Henry Jaenschke, and Alexander Kloss from the claims of the Prussian Government for military service. Citizens of the United States, in the present emergency, ought rather to be at home, upholding the Government against domestic insurrection, than to be adding to its embarrassments by invoking the exercise of its authority for their special relief in foreign countries." (Mr. Seward, Sec. of State, to Mr. Judd, min. to Prussia, No. 54, June 6, 1863, MS. Inst. Prussia, XIV. 369.)

In an instruction to Mr. Motley at Vienna, April 21, 1863, Mr. Seward, referring to the case of Mr. Judkiewicz, a native of Austria who came to the United States at the age of 13, and ten years later, having become a naturalized citizen, "returned to Austria for permanent or temporary residence," said: "The claim of exemption from military service in such cases has been constantly insisted upon by the United States, and as constantly resisted by the European states concerned. . . The United States found it necessary to resort to conscription for its own military service. The naturalized citizens generally were neither disloyal nor patriotic, but many of them sought escape from military duty here, under the influence of the same motives which had induced them to seek immunity from similar service in their native country, by acquiring the privileges of American citizenship. Thus the Government found itself committed, in an extreme conjunction of public affairs, to perplexing controversies with foreign powers, in resisting, on the one hand, their claims for the exemption from our military service of persons who appealed to their protection, and, on the other, the enforcing of claims for the exemption of a like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States. The President has decided that it is not expedient to urge questions of the latter sort in the present crisis beyond the limits of appeal to the good will and friendly disposition of foreign powers. We ought to discourage rather than encourage, so far as possible, the return of naturalized foreigners, as well as the emigration of our own citizens to Europe." (Mr. Seward, Sec. of State, to Mr. Motley, min. to Austria, April 21, 1863, MS. Inst. Austria, I. 186.)

The subject of "the right of a foreign government to require military service from such of its subjects as may have become naturalized citi-

zens of the United States, is still in controversy, and pending its settlement this Department could not properly do more in a case like your own than request the good offices of the diplomatic representative of the United States at Berlin in your behalf." (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Kahle, May 22, 1866, 73 MS. Dom. Let. 141.)

See, to the same effect, Mr. Seward, Sec. of State, to Mr. Leerburger, March 28, 1866, 72 MS. Dom. Let. 376; to Mr. Markwell, March 30, 1866, id. 386; to Mr. Hermann, April 11, 1866, id. 467; to Mr. Ball, June 4, 1866, 73 id. 214; to Mr. Malthof, April 16, 1867, 76 id. 9.

(6) ACT OF 1868.

§ 439.

Early in 1866 the United States consul at Dublin transmitted to the Department of State a correspondence in relation to a number of naturalized citizens of the United States who had been arrested and thrown into prison. It appeared by the correspondence that the lord lieutenant of Ireland had declined to recognize the interposition of the consul with respect to persons who were originally British subjects, on the ground that they must still be regarded as such. Mr. Seward, referring to this statement, observed that there was a conflict between the laws of Great Britain and those of the United States with regard to the effect of naturalization, Great Britain declining to concede that a native British subject could divest himself of his allegiance by renouncing it, while the United States had maintained that the process of naturalization completely absolved the person from his former allegiance, and invested him "with the right equally with native-born citizens to such protection and care of the Government of the United States as it can, in conformity with treaties and the law of nations, extend over him, wherever he may sojourn, whether in the land of his nativity or in any other foreign country." The conflict, when once practically raised, could, said Mr. Seward, find a friendly adjustment only by concession, in the form of a treaty or of mutual legislation, or of some form of arbitration. The answer of the lord lieutenant, if it should be adopted by Her Majesty's Government, "must bring the question up for immediate solution." Among the naturalized citizens of the United States, in regard to whom the discrimination had been made, were some who had borne arms in defence of the United States during the Civil War. Her Majesty's Government could conceive "how impossible it would be for the Government of the United States to agree to a denial or abridgement of their right to extend to them the same natural protection and care which the United States extend to native-born citizens of the United States in similar cases."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, March 22, 1866, Dip. Cor. 1866, I. 86.

The foregoing cases grew out of the Fenian movement. In consequence of the arrest of naturalized American citizens on charges connected with this movement, the question of expatriation assumed an acute form. Among the numerous cases arising at that time, the most notable one, historically, is that of Warren and Costello, two naturalized American citizens who were tried and sentenced in Dublin, in 1867, for treason-felony, on account of participation in the *Jacmel* expedition. It was shown that they had come over to Ireland in that vessel and had cruised along the coast for the purpose of effecting a landing of men and arms, in order to raise an insurrection. At their trial they claimed, as American citizens, a jury *de medietate linguae*, which was then allowed by the English law to aliens. The demand was refused on the ground of their original British allegiance. This incident, together with others, produced an excitement that, as Mr. Seward stated, extended "throughout the whole country, from Portland to San Francisco and from St. Paul to Pensacola." The subject was discussed in Congress, and exhaustive reports were made both in the Senate and in the House of Representatives on the subject of expatriation. The cause of the advocates of the right of voluntary expatriation was greatly strengthened by the conclusion by Mr. Bancroft, February 22, 1868, of the convention with the North German Union, by which the naturalization of German subjects in the United States, after an uninterrupted residence of five years, was recognized. By an act of July 27, 1868, Congress declared "the right of expatriation" to be "an inherent right of all people," and pronounced "any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation" to be "inconsistent with the fundamental principles of this Government." It was further declared that naturalized citizens of the United States should, while abroad, be entitled to receive from the United States "the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances." It was, moreover, declared that, whenever it should be made known to the President that any citizen of the United States had been unjustly deprived of his liberty by or under the authority of any foreign government, it should be the President's duty forthwith to demand of such government the reasons for the imprisonment, and, if it appeared to be wrongful and in violation of the rights of American citizenship, forthwith to demand the release of such citizen, and, if the release was unreasonably delayed or refused, to use such means not amounting to acts of war as might be necessary and proper to obtain such release, and then, as soon as practicable, to communicate all the facts and proceedings to Congress.

Act of July 27, 1868, 15 Stat. 223; Revised Statutes, §§ 1999, 2000, 2001. For correspondence concerning the cases of Warren and Costello, as well as other cases of American citizens arrested in Ireland, see message of February 10, 1868, H. Ex. Doc. 157, 40 Cong. 2 sess., and also the papers published in *Dip. Cor.*, 1866, vol. I. See, also, Moore's *American Diplomacy*, 183-188.

As to the interest excited by the arrests above referred to, see Mr. Seward, Sec. of State, to Mr. Adams, min. to England, Jan. 13, 1868, H. Ex. Doc. 157, 40 Cong. 2 sess. 298, and Mr. Seward, Sec. of State, to Mr. Thornton, Brit. min., private, June 9, 1868, MS. Notes to Great Britain, XIV. 359.

In an instruction to Mr. Johnson, July 20, 1868, with reference to negotiations for the adjustment of various questions between the two countries, Mr. Seward said: "The so-called naturalization question is the one which first and most urgently requires attention. The political institutions of the United States may in one sense be said to have for their foundation the principle of the right of individual men in any country, who are neither accused nor convicted of crime, to change their homes and allegiance according to the dictates of their own judgments and consciences and the inspiration of their individual desires for liberty and happiness. . . . As naturalized citizens of the United States, Irishmen and their descendants have a right to visit Great Britain, and to be safe in their persons and property there so long as they practice due submission to the authority of Great Britain, the same as native citizens of the United States. . . . The British Government announces to us that it is disposed to remove this embarrassment by accepting the principle of the validity of our laws of naturalization in regard to British subjects." Mr. Seward suggested the treaties with the German States as a basis on which to adjust the controversy. (Mr. Seward, Sec. of State, to Mr. Johnson, min. to England, July 20, 1868, *Dip. Cor.*, 1868, I. 328, 329.) See, also, Mr. Seward, Sec. of State, to Mr. Johnson, min. to England, No. 20, Sept. 23, 1868, *Dip. Cor.*, 1868, I. 354.

By the act of Parliament, May 14, 1870, any British subject who, when in any foreign state and not under any disability, voluntarily becomes naturalized in such state, ceases to be a British subject and is regarded as an alien.

As to the right of expatriation, see Jefferson's Works, VII. 73; John Adam's Works, VII. 174, IX. 313, 314, 321, X. 282.

The declaration in the act of July 27, 1868, that the right of expatriation is "a natural and inherent right of all people," applies to citizens of the United States who seek to exercise it as well as to those of other countries. (Williams, *At-Gen.*, 1873, 14 Op. 295.)

As to the modern English doctrine concerning expatriation, see 4 Phillimore, *Int. Law* (2d ed.), 195; and, as to the terms of naturalization in various states, see Calvo, *Droit International* (5th ed.), II. lib. 8.

#### (7) SUBSEQUENT STATEMENTS.

#### § 440.

"Austria allows no exemption from the obligation of military service to persons who have emigrated, especially those who emigrated without permission, and near the period at which they would have

become subject to conscription. Although the release of an American citizen might be obtained as a matter of *favor*, not of admitted *right*, he would be exposed to arrest, detention, and expense before his discharge could be obtained."

Mr. E. Peshine Smith, Solicitor of the Dept. of State, to Mr. Grauer, Sept. 8, 1869, 82 MS. Dom. Let. 49.

"Naturalized and native-born citizens are entitled to the same protection from the Government when in a foreign country; and both in such case are ordinarily subject to the laws of such country, and are bound to observe such laws to the same extent to which its own citizens or subjects are bound."

Mr. Fish, Sec. of State, to Mr. Fox, consul at Trinidad de Cuba, May 3, 1869, S. Ex. Doc. 108, 41 Cong. 2 sess. 202.

"This Government has insisted upon a distinction between persons who emigrate to the United States, under a prospective liability to military service which has not yet matured, and those who emigrate to avoid a military duty which has been definitely fixed upon them. In the first case it has maintained that the emigrant after naturalization in this country ought not to be subjected to punishment. Some of the Continental governments have admitted this distinction, Austria has not; and the question remains open, in the hope that it may be solved by treaty. The result is that, if you voluntarily put yourself within Austrian jurisdiction, this Government can only represent your case to the consideration of Austria as a matter of comity and favor. You may possibly be unmolested. If, however, the local authorities should arrest you, your release may be effected, if at all, after some detention, inconvenience, and expense, against which it is impossible to guarantee you."

Mr. Fish, Sec. of State, to Mr. Mintz, Feb. 1, 1870, 83 MS. Dom. Let. 211.

"TO THE GOVERNOR OF THE PROVINCE OF ———:

"H. E. the President of the Republic has been informed that certain Ecuadorians, bound to this soil by the powerful tie of birth, have believed themselves to have the right to be registered as foreigners by the diplomatic or consular agents resident in the Republic, consummating this action with the condemnable view of exonerating themselves from the sacred duty that both nature and law impose upon them. In consequence, he has been pleased to declare on this date, as charged with guarding and having guarded the constitution, that, being Ecuadorians according to it (art. 5, sec. 1st), those born in the territory of Ecuador can not lose their character as such, nor by the same can they become free from the duties to which they find

themselves subject by the home legislation, although with said intent they inscribe themselves in any book or list of foreigners."

Circular of Mr. Salazar, Min. of Interior of Ecuador, Sept. 11, 1869, enclosed with Mr. Wing, min. to Ecuador, to Mr. Fish, Sec. of State, No. 81, Feb. 28, 1871, 9 MS. Desp. Ecuador.

"With regard to the provisions of the circular, it is deemed expedient to state that so far as the title to protection of *soi-disant* American citizens rests *only* on their being registered at the legation or a consulate, we need not object to the Ecuadorian Government regarding such record as inconclusive. On the other hand, we can not admit that the rights of bona fide citizens, under international law and treaties, can be prejudiced by an Executive decree or even a more authoritative form of legislation."

Mr. Fish, Sec. of State, to Mr. Wing, min. to Ecuador, April 19, 1871, MS. Inst. Ecuador, I. 270.

With reference to the statement of Chief Justice Marshall, 2 Cranch, 119, that the situation of an alien "is completely changed where, by his own act, he has made himself the subject of a foreign power," and that such an act "certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance," Mr. Fish said: "It seems to this Department that the individual right of expatriation which was thus referred to by Chief Justice Marshall is recognized by that clause of the fourteenth amendment to the Constitution which makes subjection to the jurisdiction of the United States an element of citizenship. This conclusion is strengthened by the simultaneous action of Congress." The "simultaneous action" of Congress, as explained by Mr. Fish, comprised (1) the passage of the amendment by Congress, June 16, 1866, (2) Mr. Seward's official announcement that the amendment had been ratified, July 20, 1868, and (3) the passage by Congress of the act declaring expatriation to be "a natural and inherent right of all people," July 27, 1868.

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 257.

"When an alien applies to be admitted to citizenship in this country, having undergone the probation, and in all other respects complied with the laws on the subject of naturalization, and in open court solemnly avows his allegiance to the United States, and with the same solemnity renounces his allegiance to every other Government, and especially to that of the country of his birth, and is found to be of good moral character, he is admitted to such citizenship; and is thenceforth clothed and invested with the same rights

and privileges that pertain to native citizens of the country, and entitled to the same degree of protection, whether al road or at home."

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, mln. to Switzerland, July 28, 1883, MS. Inst. Switz. II. 187.

"This Government recognizes neither by its laws nor its practice any distinction between a native and a naturalized citizen. Both are alike entitled to the protection of the Government, abroad as well as at home, and each has such protection extended to him in the same measure under proper conditions. Each case must of course rest on its own facts and circumstances."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, mln. to England, Feb. 27, 1884, For. Rel. 1884, 216, 218.

"Questions concerning our citizens in Turkey may be affected by the Porte's non-acquiescence in the right of expatriation and by the imposition of religious tests as a condition of residence, in which this Government can not concur. The United States must hold, in their intercourse with every power, that the status of their citizens is to be respected and equal civil privileges accorded to them without regard to creed, and affected by no considerations save those growing out of domiciliary return to the land of original allegiance, or of unfulfilled personal obligations which may survive, under municipal laws, after such voluntary return."

President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xiv.

"This Government, maintaining the doctrine of voluntary expatriation, has always held that its citizens are free to divest themselves of their allegiance by emigration and other acts manifesting an intention to do so. Mere residence abroad is not, however, construed as an abandonment of allegiance. It is only when such residence is accompanied by acts inconsistent with allegiance to the United States or indicative of an intention to abandon it, that this Government holds it to have been renounced.

"This doctrine applies as well to native-born as to naturalized citizens, and also to children born out of the limits and jurisdiction of the United States whose fathers were, at the time of the birth of such children, citizens of the United States. But the laws of the United States declare that the rights of citizenship shall not descend to children born out of the country, whose fathers never resided in the United States."

Mr. Bayard, Sec. of State, to Col. Frey, Swiss mln., May 20, 1887, MS. Notes to Switz. I. 158.

“ Questions continue to arise in our relations with several countries in respect to the rights of naturalized citizens. Especially is this the case with France, Italy, Russia, and Turkey, and to a less extent with Switzerland. From time to time earnest efforts have been made to regulate this subject by conventions with those countries. An improper use of naturalization should not be permitted, but it is most important that those who have been duly naturalized should everywhere be accorded recognition of the rights pertaining to the citizenship of the country of their adoption. The appropriateness of special conventions for that purpose is recognized in treaties which this Government has concluded with a number of European states, and it is advisable that the difficulties which now arise in our relations with other countries on the same subject should be similarly adjusted.”

President Harrison, annual message, Dec. 3, 1889, *For. Rel.* 1889, viii.

“ The resolution [of the Senate, Jan. 16, 1896], further inquires :

“ ‘ Whether naturalized citizens of the United States of Armenian birth have the same rights and protection in that country as have naturalized citizens of Great Britain, France, Germany, or Russia.’

“ As to this, the privilege claimed by the Government of the United States for such citizens by naturalization in the country of origin is greater than that claimed by any one of the four Governments named. A very general rule among Governments of the European continent, and one which obtains in principle with respect to Great Britain also, is that no alien may be admitted to become a citizen of the state by naturalization except upon production of proof that his change of allegiance is permitted by the sovereign of whom he is already a dependent.

“ In the case of Great Britain this rule is somewhat differently applied. The British statute of naturalization prescribes that the naturalization of an alien shall be without force and effect should he return to the country of his original allegiance, unless by the laws thereof or by treaty between that country and Great Britain his change of status is recognized, and an indorsement in the language of the naturalization act is made upon all British passports issued to aliens as follows :

“ ‘ This passport is granted with the qualification that the bearer shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect.’

“ The United States minister at Constantinople has heretofore reported that naturalized Armenian or other Turkish subjects of Great Britain, France, Germany, or Russia returning to the jurisdiction of



Turkey are not claimed by their adopted Governments as citizens, nor protected as such, except upon proof that their change of allegiance has been permitted, or is recognized, by the Government of Turkey."

Report of Mr. Olney, Sec. of State, to the President, Jan. 22, 1896, S. Doc. 83, 54 Cong., 1 sess.; For. Rel. 1895, II. 1471, 1473.

"Our statutes do not allow this Government to admit any distinction between the treatment of native and naturalized Americans abroad, so that ceaseless controversy arises in cases where persons owing in the eye of international law a dual allegiance are prevented from entering Turkey or are expelled after entrance. Our law in this regard contrasts with that of the European States. The British act, for instance, does not claim effect for the naturalization of an alien in the event of his return to his native country, unless the change be recognized by the law of that country or stipulated by treaty between it and the naturalizing State."

President McKinley, annual message, Dec. 5, 1899, For. Rel. 1899, xxxi. See Moore's American Diplomacy, 191-192.

The Department of State does not issue certificates of renunciation of citizenship to Americans who wish to abjure their allegiance and adopt that of another power. "It recognizes their right to do so in time of peace, and does not issue to them a certificate of its consent, none such being provided for by our laws."

Mr. Loomis, Acting Sec. of State, to Mr. Hengelmuller, Austro-Hungarian ambass., No. 49, Dec. 23, 1903, For. Rel. 1903, 20.

#### 4. LAW OF PARTICULAR COUNTRIES.

##### (1) CHINA.

##### § 441.

"Your communication of the 17th ultimo, containing an inclosure of a translation of section cclv. of the penal code of China, as translated by Sir George Thomas Staunton, and inquiring 'whether the same correctly represents the law, and whether it is now understood to be in force in all or any part of the dominions of His Imperial Majesty,' was duly received, and I have the honor to say in reply that section cclv. of the Chinese penal code referred to has no reference whatever to Chinese emigration as contemplated in and sanctioned by the Burlingame treaty. Under the general head of 'Renunciation of allegiance,' the specific acts so carefully defined, with their corresponding punishments, point to the presumptive existence of a lesser or greater degree of treasonable intent against the Government, and

it contemplates conspiracies and overt acts of rebellion against the Government as being the logical sequence of 'renunciation of allegiance,' which antecedes them both in time and existence; hence their classification under that head or section. Emigration, as sanctioned by foreign treaties, is taken out of the category of treasonable acts, and is therefore beyond the scope of the section.

"In Article V. of the Burlingame treaty we find this language, which is conclusive on this point: 'The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance.'"

Mr. Yung Wing, Chinese min., to Mr. Evarts, Sec. of State, March 2, 1880, For. Rel. 1880, 302.

The translation referred to reads as follows:

"All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offense no distinction shall be made between principals and accessories.

"The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of state. Those females, however, with whom a marriage had not been completed, though adjusted by contract, shall not suffer under this law; from the penalties of this law, exception shall also be made in favor of all such daughters of criminals as shall have been married into other families. The parents, grandparents, brothers, and grandchildren of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2,000 *li*.

"All those who purposely conceal and connive at the perpetration of this crime shall be strangled.

"Those who inform against and bring to justice criminals of this description shall be rewarded with the whole of their property.

"Those who are privy to the perpetration of this crime and yet omit to give any notice or information thereof to the magistrates shall be punished with 100 blows, and banished perpetually to the distance of 3,000 *li*.

"If the crime is contrived, but not executed, the principal shall be strangled and all the accessories shall each of them be punished with 100 blows and perpetual banishment to the distance of 3,000 *li*.

"If those who are privy to such ineffective contrivance do not give due notice and information thereof to the magistrates, they shall be punished with 100 blows and banished for three years.

"All persons who refuse to surrender themselves to the magistrates when required, and seek concealment in mountains and desert places in order to evade either the performance of their duty or the punishment due to their crimes, shall be held guilty of an intent to rebel, and shall therefore suffer punishment in the manner by this law provided. If such persons have recourse to violence and defend themselves when pursued, by force of arms, they shall be held guilty of an overt act of rebellion, and punished accordingly." (Id. 301.)

## (2) FRANCE.

## § 442.

"It is understood that the French Government claims military service from all natives of France who may be found within its jurisdiction. Your naturalization in this country will not exempt you from that claim if you should voluntarily repair thither."

Mr. Cass, Sec. of State, to Mr. Le Clerc, May 17, 1859, 50 MS. Dom. Let. 318.

"With France, our ancient and powerful ally, our relations continue to be of the most friendly character. A decision has recently been made by a French judicial tribunal, with the approbation of the Imperial Government, which can not fail to foster the sentiments of mutual regard which have so long existed between the two countries. Under the French law no one can serve in the armies of France unless he be a French citizen. The law of France recognizing the natural right of expatriation, it follows as a necessary consequence that a Frenchman, by the fact of having become a citizen of the United States has changed his allegiance and has lost his native character. He can not, therefore, be compelled to serve in the French armies in case he should return to his native country. These principles were announced in 1852 by the French minister of war, and in two late cases have been confirmed by the French judiciary. In these, two natives of France have been discharged from the French army because they had become American citizens. To employ the language of our present minister to France, who has rendered good service on this occasion, 'I do not think our French naturalized fellow-citizens will hereafter experience much annoyance on this subject.'"

President Buchanan, annual message, Dec. 3, 1860, Richardson's Messages and Papers, V. 640.

This passage related to the cases of Mr. Puyoon and Mr. Zelter, who were, respectively, discharged by judicial tribunals, at Toulouse and Wesenbourg, from military service, on the ground of their naturalization in the United States. (Mr. Cass, Sec. of State, to Mr. Faulkner, min. to France, Oct. 3, 1860, MS. Inst. France, XV. 487.)

"Although French tribunals have, within the last few years, fully recognized in several cases the legal efficacy which this Government claims for an act of naturalization accorded by the laws of the United States, still the expensive and protracted ordeal through which the laws of France require a naturalized American citizen of French birth to pass, in order to establish the fact of his nationality, is a grievance to which such natives of France are liable to be subjected upon returning to that country, and, if so subjected, would have to

be borne by them, notwithstanding the interposition of this Government in their behalf."

Mr. Seward, Sec. of State, to Mr. Monton, Feb. 24, 1862, 56 MS. Dom. Let. 403.

"In those papers [dispatches, No. 302, April 13, and No. 303, April 14, 1866] you have given us an account of your intervention in the cases of George Schneider, J. Baptiste Cochener, François Pierre, and Frederick Lodry, severally. Each of those persons, though a native of France, was naturalized in the United States, and two of them served in our military forces during the recent war. Each of them having returned to France bearing a passport of this Government was arrested, cast into prison, and detained a painful period, awaiting trial for 'refractoriness' against conscription as a crime against the [civil] laws of the empire. . . .

"In regard to the general subject of the dishonor in France of our passports of naturalized citizens, the President thinks it desirable that you should solicit a conference with Mr. Drouyn de Lhuys.

"In such a conference you may say to him that we appreciate the difficulties and the delicacy of a conflict between immunities demanded by the passport and the laws of military conscription. We have encountered the embarrassment of that conflict in our late civil war. The result of our late experience is that a foreign passport may be safely taken as furnishing presumptive evidence of a title to exemption from military service, so long at least as the government which grants the passport shall be found to be acting in good faith and in conformity with the law of nations.

"2d. That when a person representing himself to be an alien, and whether producing a passport or not, is conscripted, he shall be at liberty to present his claim, with evidence in its support to a competent military tribunal, by which the case shall be heard summarily. A discharge by such military tribunal to be final. If, on the contrary, the claim of an alien is overruled by the military tribunal, then the discharge, with the facts relative to the case shall be remitted to the minister of state charged with the conduct of foreign affairs.

"At every stage of the case the representatives of the nation whose protection is invoked are allowed to intervene. If the department of foreign affairs decides the claim of alienage to be well taken, the conscript is immediately released. If, on the contrary, the claim of alienage is denied by that department, then it becomes a subject of diplomatic discussion.

"A considerable proportion of the inhabitants of the United States are foreigners, either naturalized or unnaturalized. They came to us from all the nations of Europe, as well as from American states. We raised in four years not altogether without conscription armies

unparalleled in numerical force, yet cases of injustice and hardship, resulting from the denial of justice on the plea of alienage, are believed to have been very rare.

"You will submit to Mr. Drouyn de Lhuys in a friendly manner and spirit, the question whether it may not be found practicable to make some modification of the imperial military laws in conformity with these suggestions.

"All the vigor of invention, all the resources of commerce, and all the influences of civilization combine to stimulate intercourse between citizens and subjects of friendly states. Care ought to be taken by every government not to obstruct this intercourse unnecessarily, or to suffer occasions for the wounding of national sensibilities to arise, where they can be prevented.

"I feel sure that the enlightened Government of France will concur in these sentiments."

Mr. Seward, Sec. of State, to Mr. Bigelow, mln. to France, May 7, 1866,

MS. Inst. France, XVII. 568; Dip. Cor. 1866, I. 304.

For Mr. Bigelow's Nos. 302 and 303, see Dip. Cor. 1866, I. 291, 297.

"I have received your letter of the 11th instant, and have to state in reply that the subject of the right of naturalized citizens of the United States to exemption from military proscription in the countries of their birth, is the subject of correspondence; and until some arrangement upon principles on the subject shall have been arrived at, the only thing the United States Government can do in the way of interposition is to direct its diplomatic agents to exert their good offices in such cases when they occur. France is an exception to this condition of things, and it is only necessary for a Frenchman who has been *fully naturalized* in the United States, on his return to France to report at once to the mairie of the district in which his name is enrolled, producing his evidences of nationality and ask to have his name erased from the conscription list, when, according to the laws of France, he is exempt from military service."

Mr. Seward, Sec. of State, to Mr. Theirneck, July 20, 1866, 73 MS. Dom. Let. 465.

"Your letter of the 11th instant, inquiring whether after a residence of fifteen years in the United States and a compliance with its naturalization laws, you can be held to perform military service in France, has been received. The United States Government cannot give you any guaranty of protection from the laws of France. If you should return to that country. For further information upon this subject, I am obliged to refer you to your legal adviser or to any gentleman of the law, who can give more time to the examination of your question than my engagements will permit." (Mr. Seward, Sec. of State, to Mr. Specht, Jan. 22, 1867, 75 MS. Dom. Let. 130.)

"In his message at the opening of Congress in December last, the President stated that France had been forbearing in enforcing the doctrine of perpetual allegiance." (Mr. Seward, Sec. of State, to Mr. Allison, M. C., March 19, 1867, 75 MS. Dom. Let. 440.)

"Although we have no naturalization treaty with France, that Government has manifested a disposition to deal liberally with those who, like yourself, have incurred the penalties of her military laws and have since become *bona fide* citizens of the United States.

"Should you visit France, provided with proper proof of your American citizenship, it is believed that the only trouble, if any, to which you might possibly be subjected, would be detention awaiting a judicial investigation of your case, with perhaps the imposition of a small fine. It is proper to add, however, that, in the event of your arrest and detention under the circumstances referred to, this Government would not feel itself under an obligation to do more than interpose its good offices in your behalf."

Mr. Fish, Sec. of State, to Mr. Lafevbre, April 3, 1869, 80 MS. Dom. Let. 531.

"It is understood to be a provision of the law of France that when a Frenchman has lost his quality of French citizen he cannot serve in the armies of that country, and that when that quality has been lost for over three years he will not be punished for 'insoumission.' These questions, however, have to be determined in a civil court in France, and it should be remembered that during their pendency the party is liable to arrest, detention, and, it may be, imprisonment, besides the expense of employing counsel.

"In a recent dispatch from Mr. Washburne, our minister at Paris, it is stated that naturalized citizens of the United States born in France, upon returning to the place of their birth have been of late sometimes subjected to great inconvenience and expense on account of claims of the nature alluded to for their military service.

"The Department cannot, in view of these facts, give any advice to persons situated as your sons are, upon the propriety or otherwise of their subjecting themselves to such possible annoyances and inconveniences by visiting France. On these questions the party must judge for himself, with the knowledge that he personally assumes the risk and responsibility of such expenses and inconveniences as he may thereby be subjected to."

Mr. Fish, Sec. of State, to Mr. Jouffret, Feb. 11, 1874, 101 MS. Dom. Let. 291.

To the same effect is Mr. Fish, Sec. of State, to Mr. Pintard, Feb. 12, 1874, 101 MS. Dom. Let. 303.

See Mr. Hunter, Act. Sec. of State, to Mr. May, Dec. 27, 1875, 111 MS. Dom. Let. 235.

Alfred P. Jacob was born in the United States, July 10, 1858, of French parents. His father registered him in a French consulate as a Frenchman, but afterwards, when Alfred was seventeen years of age,

became a naturalized citizen of the United States. In 1879, Alfred, who was then nineteen years of age, and had not before been in French jurisdiction, went to France, intending to remain abroad a few years. In France he was drafted into the army. He applied to the American legation, but its interposition was in vain, and he served four years in the French army, after which he returned to the United States. After his return he invoked the interposition of the Department of State to have his name stricken from the French military rolls, as he desired to avoid further trouble in France in the event of his return to that country. The French Government, when the case was submitted to it in 1879, had replied that the personal status of the young man, who was born in the United States before his father had obtained American naturalization, was not, according to French jurisprudence, modified by the change of his father's nationality, and that the minister of war, therefore, found it impossible to relieve him from the military obligations incumbent on all individuals who had not lost their French quality by one of the modes prescribed by the civil code. It was added that questions of nationality belonged, besides, exclusively to the courts, and that Mr. Jacob should lay before the competent jurisdiction such reasons as he might have for no longer considering himself a Frenchman.

This reply was reaffirmed by the French Government in 1884, with the qualification that, as Mr. Jacob had performed his active military service, the minister of war would give his support by a favorable note to any application which he might address to the minister of justice, should he apply for permission to change his allegiance. In this relation, the French foreign office said: "According to the terms of article 10 of our civil code, Alfred Jacob is French, as having been born of a Frenchman in a foreign country. . . . Our legislation does not admit in fact, like that of the United States, that the naturalization of the father applies to his children born before the naturalization, no one in France having the right, by his act alone, to modify the status and qualifications of others. Mr. Alfred Jacob is, then, French in our view, and he remains, in France, submitted to the obligations of the reserve and territorial army set forth by article 37 of the law of the 27th July, 1872."

Mr. Frelinghuysen, Sec. of State, to Mr. Morton, min. to France, No. 436, Jan. 21, 1884; Mr. Morton to Mr. Frelinghuysen, No. 494, Feb. 5, 1884; Mr. Frelinghuysen to Mr. Morton, March 18, 1884; Mr. Morton to Mr. Frelinghuysen, May 6, 1884; For. Rel. 1884, 135, 139, 145, 148, 150.

See, also, For. Rel. 1888, I. 543, 556, reaffirming the previous French position in this case.

"By the French code all Frenchmen who become citizens of another country by the laws thereof thereby lose their French citizenship. This Department, however, cannot give Mr. Vandoit any assurance

in advance against arrests or other annoyances to which he might possibly be subjected in France in case of his return to that country, nor can it advise him as to the expediency or propriety of such return. This must be left to his own judgment. Should he, however, conclude to return to France, and while there be arrested or held on account of previous military occupations, this Government would extend to him all the protection which as an American citizen he may be found, under the circumstances, entitled to." (Mr. Frelinghuysen, Sec. of State, to Mr. Brents, Jan. 24, 1884, 149 MS. Dom. Let. 481.)

John B. Foichat was born in France, January 4, 1853. In 1870, at the age of seventeen, he came to the United States, where, in 1883, he was admitted to citizenship. In August, 1883, he obtained a passport and went to France, arriving there in the following month. In November, 1884, he was arrested on the charge of having failed to report for military service. He protested and, exhibiting his naturalization papers and passport, demanded that he be released. He was kept, however, two days and three nights in the military prison at Chamberry, and was then handcuffed and taken to the military prison at Grenoble to be tried by court-martial. He was detained at Grenoble four days, when he was released through the efforts of the United States consul at Lyons. March 25, 1884, the American minister at Paris was instructed to look into the case and, if the facts were found to be as stated, to present it to the minister of foreign affairs, with an earnest request that it might receive early and just consideration and that a reasonable pecuniary indemnity might be paid. The French Government admitted that the facts were substantially as stated, but denied that they entitled the claimant to any compensation. In a note to the American legation, October 22, 1884, M. Ferry, minister of foreign affairs, said that Foichat was arrested on the charge of *insoumission*, and added: "Upon principle we have constantly refused to admit that a Frenchman, naturalized in a foreign country, can be exempted if he returns to France from being answerable for the offense of insubmission, when the naturalization has taken place subsequently to the existence of the offence. You will understand that we cannot abandon this jurisprudence, which is dictated by a question of public order of a most important character, and against which the Government of the United States would be all the less founded in protesting, as it is in conformity with one of the principal provisions which appear in the treaties of naturalization concluded by it with certain powers." M. Ferry then cited Article II. of the treaty between the United States and the North German Union of February 22, 1868, to the effect that a naturalized citizen remains punishable for offences committed prior to his emigration, subject to the statutes of limitation.



Mr. Frelinghuysen, Sec. of State, to Mr. Morton, min. to France, No. 477, March 25, 1884; Mr. Vignaud, chargé, to Mr. Frelinghuysen, No. 651, Oct. 27, 1884: For. Rel. 1884, 145, 174.

In a dispatch to Mr. Frelinghuysen, No. 665, Nov. 13, 1884, Mr. Vignaud makes an extended and interesting report on the French law of citizenship, especially with regard to military service. The son of every Frenchman, says Mr. Vignaud, is registered at the place of his birth if born in France, or at the place of his family's residence if born abroad, as liable to military service. This registration forms in each commune a recruiting list, which is drawn up every year by the mayor, who afterwards sends it to the prefecture of the department, where it is combined with all the other lists in a general one, comprising all men belonging to the department born twenty years before. When the time comes each person on the list is notified to present himself at a designated place. If he resides abroad the notice is served on him through his consul or through members of his family residing in France. If he fails to report, he is charged with the offence known to French law as "*insubmission*" (*insoumission*), and the police are ordered to arrest him when found. If, when arrested, he does not resist, he is generally dealt with gently; if he resists, he is handcuffed and treated roughly. The police deliver him to the military authorities as an *insoumis*, and a court martial proceeds to try him as such. If he pleads that he has renounced his original nationality, the court martial suspends action while the defendant appeals to the civil courts. While this appeal is pending he is usually left at liberty. In the civil court the course of procedure is by summons to the prefect of the department to erase the individual named from the recruiting list. On production of duly authenticated proofs of foreign nationality, by birth or by naturalization, the civil court renders a judgment to the effect that the defendant, having ceased to be a French citizen, cannot serve in the French army. The defendant is then sent back to the military court. His name is erased from the military rolls; but he is then tried for the offence of "*insubmission*" committed before the rendering of the judgment that he had lost French nationality. If three years have elapsed since he was naturalized, he is discharged by limitation. If such a period has not elapsed, he is sentenced to a fine or to a few weeks' or months' imprisonment, or both, according to the circumstances. If he has lived a long time abroad, and the circumstances indicate that he expatriated himself in good faith and not for the purpose of evading his military obligations, the sentence is made as light as possible, if not altogether omitted; but, in the contrary case, it is made as severe as possible. When, whether punished or not, he is released by the military authorities, he is again turned over to the civil authorities, who, if he is considered a bona fide foreigner, discharge him, but, in the contrary case, order him to be expelled. "Nine times out of ten," says Mr. Vignaud, "an order of expulsion awaits the Frenchman naturalized abroad who ventures to come to France before having performed his military service. The interposition of the legation in such cases is useless. The French Government is very sensitive on this point, and will listen to no request tending to allow one who has averted military service by placing himself under a foreign flag to remain unmolested, and apparently in defiance of the French military laws, in the midst of

those who are rigorously held to obey them. We have occasionally obtained a short extension of the time allowed for leaving France. We have never secured the revocation of an order of expulsion issued under such circumstances." (For. Rel. 1884, 176-179.)

The information given by Mr. Vignaud is summarized in Mr. Bayard, Sec. of State, to Mr. Lavigne, April 25, 1885, 155 MS. Dom. Let. 194.

November 9, 1886, Mr. McLane, American minister at Paris, asked for the discharge of Pierre Arbios, a naturalized American citizen, who was enrolled in the French army. May 5, 1887, he made a similar demand in behalf of John Fruchier. Both Arbios and Fruchier emigrated to the United States when minors, and both afterwards obtained American citizenship, Arbios through the naturalization of his father, and Fruchier by direct naturalization. On revisiting France they were arrested and imprisoned and brought before the military authorities, who put them into the army.

With reference to these cases, Mr. Bayard instructed Mr. McLane, February 15, 1888, to inform the French Government that the Government of the United States held that a decree of naturalization granted by it to a French citizen was not open to impeachment by the French Government, and that if the subjection of Arbios and Fruchier to enforced military service was "based upon an assumption that they are *not* citizens of the United States, this Department asks for their immediate release, and for a proper compensation for the losses which they have received by such detention." Mr. Bayard further stated that it could not be admitted that American citizens "not charged with any crime, should be detained under arrest for even a single day after their proofs of citizenship have been presented. In cases like this the United States can never admit the propriety of submitting to the ordinary delays of judicial action. The redress which it thus asks the United States Government, when appealed to by foreign governments under similar circumstances, has always promptly given. . . . I cannot but think that France, who now accepts as fully as does the United States those principles of liberty of which the right of expatriation is part, will not, in view both of her past and her present relations to the United States, take a position conflicting with these free principles, with the business interests of both countries, with international comity, and with a system on which the Government of the United States is based."

M. Goblet, then minister of foreign affairs, in a note to Mr. McLane, April 26, 1888, stated that it had "never occurred to the French authorities to question the value of the act of naturalization by virtue of which a Frenchman by birth has become an American. But you will agree with me that, if the Government of the United States is, in fact, the only judge of the conditions under which it grants naturalization to a foreigner, it is the right, on the other hand, of the gov-

ernment under whose jurisdiction this foreigner is, and of it alone, to decide whether the aforesaid foreigner has complied with the law of his country of origin, for, if consent is, as you very justly remark, an indispensable element to the validity of the contract conferring nationality, other conditions can be required as well." M. Goblet added, however, that, while entirely reserving the question of principle involved, his colleague, the minister of war, had consented, as an "act of courtesy," to grant leaves of absence to Arbios and Fruchier till the time of the expiration of the terms of active service which they, respectively, owed; and he added that both the minister of war and himself were quite ready to examine any proposals which might be presented for the general settlement of such questions between the two governments.

Mr. McLane, min. to France, to Mr. Bayard, Sec. of State, Jan. 24, 1888; Mr. Bayard to Mr. McLane, Feb. 15, 1888; Mr. McLane to Mr. Bayard, April 27, 1888: For. Rel. 1888, I. 502, 510, 530-532.

In the earlier stages of the Arbios case Mr. Bayard wrote to Mr. McLane that he must leave to his "good judgment the propriety and probabilities of success of any further appeal to the French Government." (April 30, 1887, For. Rel. 1887, 293.)

Aug. 25, 1887, the legation, in reply to an inquiry from the Department of State as to the condition of the case, reported that, as the instructions of the 30th of April were understood to be discretionary, it was not deemed advisable further to press the case at that time, since nothing could be gained by so doing. (Mr. Vignaud to Mr. Bayard, Aug. 25, 1887, For. Rel. 1887, 350.)

"In the absence of conventional agreement as to naturalization, which is greatly to be desired, this Government sees no occasion to recede from the sound position it has maintained not only with regard to France but as to all countries with which the United States have not concluded special treaties." (President Cleveland, annual message, Dec. 3, 1888, For. Rel. 1888, I. xlii.)

"Your letter of the 15th instant, inquiring whether a naturalized American citizen, born in France, would be subject to military duty in case he should revisit his native country, has been received.

"In reply, I must inform you that your inquiry belongs to a class respecting which the Department of State refrains from expressing an authoritative opinion in advance of a case actually arising and calling for diplomatic intervention. It may, however, be stated that the Department's understanding of the general French rule in such cases is, that when a male child is born in France, the fact is registered at the place of birth and transmitted to the proper prefecture as of one eventually liable to military duty. On the completion of the twentieth year the individual is summoned to present himself at a designated place. If residing abroad, the notice is served on him through his consul, or through the parents and relations residing in France." (Mr. Bayard, Sec. of State, to Mr. Wollner, Oct. 24, 1885, 157 MS. Dom. Let. 442.)

"On the 22d of last March you were kind enough to write me with a view of obtaining the erasure from the conscription list of our

army of the name of Mr. Victor Poidebard, born in Lyons on June 5, 1871, and who became an American citizen through the naturalization of his father in the United States.

"The minister of war, to whom I immediately transmitted your communication, observes, firstly, that according to the terms of article 17 of the civil code, modified by the law passed on the 26th of June, 1889, a Frenchman still subject to the obligations of active military service can not lose his French nationality by means of naturalization in a foreign country unless this naturalization has been authorized by the French Government. Under these circumstances the only request that Mr. Poidebard could consistently make was to ask of the Government of the Republic their authorization to his becoming a naturalized American.

"Gen. Loizillon thought it his duty to examine carefully this point in order to see if such a favor could be granted in this special case, and he was obliged to realize that such a decision would have the serious disadvantage of encouraging young Frenchmen to become naturalized in a foreign country in order to avoid military service, which would not fail to provoke violent protestation on the part of those families having relatives in the service.

"Mr. Poidebard, it is true, could have availed himself of the dispensation contained in article 50 of the law of July 15, 1889, on recruiting, by claiming he moved to the United States before the age of 19, and had not since then made a longer stay in France than three months; but he failed to claim this dispensation before the court of revision of the class of 1891, which alone, according to the terms of article 18 of the aforesaid law, is privileged to act in this respect. Consequently he is definitely debarred from having recourse to this channel.

"Under these circumstances my colleague, the minister of war, charges me to express to you his regrets that he finds himself unable to reply favorably to your request."

Mr. Develle, French min. of foreign affairs, to Mr. Coolidge, ambassador to France, May 2, 1893, For. Rel. 1893, 301.

Mr. Coolidge stated in the note to which the foregoing was a reply, that Poidebard had become a naturalized citizen of the United States not only through the naturalization of his father, but also by independent admission to citizenship after he became of age. (Mr. Coolidge to Mr. Develle, March 22, 1893, For. Rel. 1893, 300-301.)

Arthur D. Hubinoit, otherwise known as Arthur D. Bennett, a native of France, was brought, when two years old, to the United States, where, at the age of 24, he was naturalized. Returning then to France, he was arrested and tried on a charge of *insoumission*. He was acquitted, but was held still to be French; and, having passed

the age of active military service, he was placed on the list of reserves, and permission was given him to proceed to Pittsfield, Massachusetts, where any military notice would reach him. When released he had, as he stated, spent all his money, and he desired to hold the French Government responsible pecuniarily for his loss of time and the cost of his return to the United States. The embassy of the United States at Paris replied that it had, under instructions, requested his discharge by the French Government, but that it could not, without further instructions, present his pecuniary claim.

"Your response to Mr. Hubinoit's inquiry was discreet and proper. It is not recalled that the solicited discharge of an American citizen from military duty in a foreign country has been followed by a successful claim for reparation for actual loss and injury sustained. Certainly no claim of exemplary damages has been preferred. As a general thing the interested party is satisfied with his release from the embarrassing situation in which he had been placed by his inadvertent return to his original jurisdiction, and this is especially so when there is probable cause for proceedings against him, as in the present instance, when the naturalization of Mr. Hubinoit under another name required somewhat elaborate proof to establish his asserted identity.

"There have, however, been instances where a foreign government has graciously compensated a person erroneously detained and released, for actual loss of time or money, and if the circumstances of the present case appear, in the judgment of the embassy, to warrant an informal suggestion to the French Government in this regard, it is possible that it might be taken into kindly consideration without formal admission of liability in the premises."

Mr. Sherman, Sec. of State, to Mr. Vignaud, chargé d'affaires ad int., Aug. 12, 1897, For. Rel. 1897, 146.

"I have to acknowledge the receipt of your letter of the 19th ultimo. It appears from your statement that you were born in France and when twenty years of age came to the United States; that your parents, under the obligation imposed by French law upon parents whose children are absent from France at the period of drafting for military duty, registered you as a French citizen and you were drafted; that you remained in the United States, however, taking steps to become naturalized here, and that you were finally admitted to citizenship in December, 1889. . . . The Department understands that the failure of a French citizen to perform military service, after being drafted, constitutes an offence against French military law. Should you voluntarily place yourself within French jurisdiction you would be subject to the laws of France. In the

absence of a treaty of naturalization between the United States and France, this Government cannot guarantee immunity from arrest or punishment under these laws. Should occasion arise, however, this Department, through the embassy in Paris, would extend to you any proper assistance."

Mr. Hay, Sec. of State, to Mr. Darche, March 6, 1900, 243 MS. Dom. Let. 360.

Emile Robin was born in France January 9, 1869. After he had served in the active army the full term of three years, he proceeded to the United States, where he was naturalized March 31, 1901. Though released from the active service, he was still liable to service in the reserve in the active army, and therefore, under the law of June 26, 1889, new art. 17 of the Code, he could not renounce his French nationality without the consent of the Government. At his urgent request the American embassy in Paris applied to the French Government for his complete discharge from all military obligations in France. The French Government replied: "By the terms of Article 17 of the Civil Code, if a Frenchman is still subject to the obligations of military service in the active army, naturalization abroad will not cause him to lose the quality of Frenchman unless it was authorized by the French Government. As Mr. Robin would have been transferred to the territorial army only on March 12, 1903, he was subject to the formality of an authorization when he acquired in 1900 his American naturalization. That authorization not having been applied for, the naturalization acquired in America by Mr. Robin is without value in the eyes of the French Government."

Mr. Delcassé, min. of foreign affairs, to Mr. Vignaud, U. S. chargé, Oct. 31, 1901, For. Rel. 1901, 157.

"It frequently happens that American citizens of French origin apply for reliable information concerning their position in regard to the French military and nationality laws. In view of such inquiries I send the following report, which may interest the Department as well as enlighten those having any concern in the matter, if it is deemed advisable to make it public.

"Various communications from this embassy have acquainted the Department with the different provisions of the French law on nationality of June 26, 1889, which is the only one applicable to the cases now under consideration. I refer particularly to Mr. Reid's No. 29, of July 16, 1889 (Foreign Relations, 1890, p. 276), and to my Nos. 513, of April 7, 1892 (Foreign Relations, 1893, p. 295), and 47, of August 22, 1893 (Foreign Relations, 1893, p. 303).

"It is proposed now to inform more fully the Department with regard to the official construction of the clause of that law which

relates to naturalization in connection with military service and to the manner it is applied to American citizens of French origin.

"According to that clause, article 17 of the Civil Code is now made to declare that a Frenchman naturalized abroad does not cease to be French if he is still subject to military service in the active army, unless his naturalization was obtained with the consent of the French Government. Nothing in the law indicates whether this clause is to be applied to those who had failed to discharge their military obligations before the law was passed, or simply to those who had committed that offense after the law was enacted. The language, also, of the law is not very explicit with regard to what is meant by the 'active army.' The period of service in that army is only for three years, but from the active army every Frenchman passes first into the reserve, in which the period of service is seven years, after which period he is transferred to the territorial army. Was it to be understood that the period during which a Frenchman can not renounce French citizenship without the consent of his Government embraced the whole time during which his military services were due in both the active army and the reserve of that army?

"The ruling of the French Government in the cases submitted to its consideration by this embassy have settled these points, and it is now possible to state the exact meaning of the law according to the French Government, and what the position is of a Frenchman naturalized abroad without the consent of his Government, before having been discharged from the French active army.

"With regard to the meaning of the law it is understood now:

"(1) That it has a retroactive effect; it applies to those who have avoided military service and acquired another nationality before as well as after the law was enacted.

"(2) That the words 'active army' mean both the active and the reserve of the active army; and

"(3) That the expression 'If he is still subject to military service,' is to be understood as applying to the date at which the naturalization was obtained.

"Under this construction the law is made to have the following effect:

"The Frenchman naturalized abroad without the consent of his Government, who at the date of his naturalization was still subject to military service in the active army or in the reserve of the active army, remains French, and as such is amenable to the military laws of France.

"Not having responded to the notice calling him to accomplish the three years' military service which every Frenchman has to perform, he is placed on the list of those charged with *insoumission*—noncompliance with the national military laws—and if found under the

jurisdiction of France, whatever his age may then be, or whatever the number of years he has lived abroad, even if he left France in his tender infancy, and even if he was born abroad, provided his father was French at the time, he is arrested and tried as an *insoumis*, and after such trial turned over to the active army or to the reserve of the active army or to the territorial army, according to his age.

“When a Frenchman has passed the age during which he may be called to serve in the active army or its reserve—that is to say, when his name has been transferred from the muster roll of that army to that of the territorial army—he does not need the consent of his Government to be lawfully naturalized abroad; and when naturalized in the United States under such conditions an application from this embassy secures, without difficulty, the recognition of his American citizenship, provided this application is accompanied by the naturalization papers of the person in whose behalf it is made and by an American passport. The production of the passport is not absolutely necessary and can be dispensed with, but the original papers of naturalization or an authentic copy of the same must be produced.

“Before or after his naturalization abroad a Frenchman may ask his Government its consent to renounce French national character, but if he is of the age during which active military service is due, this consent is never given, or given only under very exceptional circumstances. I do not know of any successful application of that character. This consent is, on the contrary, usually given to those who, having passed the age of service in the active army and its reserve, can only be called to do service in the territorial army, although their naturalization may have taken place while still belonging to the active army.

“Applications of this kind should be made direct to the minister of justice by the interested parties and must be accompanied by a fee of 1.75 francs and by a statement giving all necessary particulars concerning the applicant. When granted it is in the shape of a decree signed by the President and countersigned by the minister of justice and another high official. I inclose herewith a copy of the form used in such cases. This decree is then communicated to the minister of war, who directs that the name of the person concerned be erased from the military lists of the French army, as being no longer French, and who informs that person of his action.

“It is the rule of this embassy to decline making any application of this kind in behalf of those who are already in possession of their full American papers of naturalization, as such a step might imply an improper admission on our part. But it does not refuse its good offices to those who desire to secure the consent of their Government before having been naturalized.”

Mr. Vignaud, chargé d'affaires ad int., to Mr. Sherman, Sec. of State,  
Aug. 2, 1897, For. Rel. 1897, 141.



*Form of consent given to a Frenchman to change his allegiance.*

[Translation.]

Ministry of Justice: The President of the French Republic on the report of the keeper of the seals, minister, decrees:

ART. I. M. ———, born on ———, at ———, residing at ———, is authorized to become a naturalized American.

ART. II. The keeper of the seals, minister of justice, is charged with the execution of this decree, which will be published in the Bulletin of Laws.

Done at Paris, the ———.

(Signed)

(Name of President.)

(Signed)

(Name of Minister.)

*The Keeper of the Seals, Minister of Justice.*

For exemplification.

The Councillor of State, Director of Civil Affairs and of the Seal:

(Signature.)

See a list of military cases in France under the law of 1889, For. Rel. 1897, 143 et seq.

As communicating information concerning the French law, as above stated, see Mr. Moore, Act. Sec. of State, to Mr. Bossange, July 23, 1898, 230 MS. Dom. Let. 344; Mr. Hill, Assist. Sec. of State, to Mr. Plednor, jr., June 30, 1900, 246 MS. Dom. Let. 204.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"All Frenchmen who are are not declared unfit or excused may be called upon for military duty between the ages of 20 and 45 years. They are obliged to serve three years in the active army, ten in the reserve of the active army, six in the territorial army, and six in the reserve of the territorial army.

"If released from all military obligations in France, or if the authorization of the French Government was obtained beforehand, naturalization of a former French citizen in the United States is accepted by the French Government; but a Frenchman naturalized abroad without the consent of his Government, and who at the time of his naturalization was still subject to military service in the active army or in the reserve of the active army, is held to be amenable to the French military laws. Not having responded to the notice calling him to accomplish his military service, he is placed on the list of those charged with noncompliance with the military laws, and if he returns to France he is liable to arrest, trial, and upon conviction is turned over to the army, active, reserve, or territorial, according to his age. Long absence from France and old age do not prevent this action.

"A Frenchman naturalized abroad, after having passed the age of service in the active army and the reserve, nevertheless continues on

the military list until he has had his name struck from the rolls, which may usually be done by his sending his naturalization certificate through the United States embassy to the proper French authorities."

Circular Notice, Department of State, Washington, Jan. 21, 1901, For. Rel. 1901, 153.

Article I. of the French law of February 7, 1851, provides: "Every person born in France of a foreigner who was himself born there, is a Frenchman, unless within the year which follows the time of his majority, as fixed by the law of France, he claimed the quality of foreigner by a declaration made either before the municipal authority of the place of his residence, or before the agents, diplomatic or consular, accredited to France by the foreign government."

The French law of 1851 continued in force in Alsace-Lorraine till 1873, when the German law of June 1, 1870, was introduced there.

For. Rel. 1886, 320, 325; For. Rel. 1887, 389.

But, by the law of 1889, as amended by the law of 1893, "any person born in France of foreign parents, one of whom was also born there, is French," subject to the right, if it was his mother who was born in France, to disclaim his French nationality in the year following his majority. (Mr. Vignaud, chargé, to Mr. Gresham, Sec. of State. No. 47, Aug. 22, 1893, For. Rel. 1893, 303.)

### (3) GERMANY.

#### § 443.

Mr. Pendleton, in a despatch to the Department of State of February 1, 1886, gave a translation of the German law of June 1, 1870, concerning the loss and acquisition of nationality in the North German Confederation and in various States thereof, as follows:

"SECTION 13. State nationality can be lost henceforth in the following ways only:

"(1) By discharge upon application therefor (sections 14 and following).

"(2) By decree of the public authority (sections 20 and 22).

"(3) By a residence of ten years abroad (section 21).

"(4) In the case of illegitimate children, the father having another allegiance than that of the mother, by legitimation effected pursuant to the provisions of law.

"(5) In the case of a North German by marriage with a person having allegiance in another State of the Confederation, or with a foreigner.

"SEC. 21. North Germans who leave the territory of the Confederation and sojourn during a period of ten years uninterruptedly

abroad lose thereby their state nationality. The above-designated period is reckoned from the time of the departure from the territory of the Confederation; or, if the person leaving is in possession of a passport or home certificate, from the time of the expiration of this paper. It is interrupted by an entry on the files of a consulate of the Confederation. Its course recommences with the day following the cancellation of the entry on those files.

\* \* \* \* \*

“For North Germans who sojourn in a foreign state for at least five years uninterruptedly and at the same time acquire nationality there, the period of ten years may by treaty be reduced to one of five, whether or not the persons concerned are in possession of a passport or home certificate.”

This law, as Mr. Pendleton stated, was, by the law of January 8, 1873, made applicable to Alsace-Lorraine.

For. Rel. 1886, 317, 318.

By section 14 of the law of June 1, 1870, it is provided that the discharge from German nationality is granted by the issue of a discharge document by the superior administrative authority of the state of nativity.

Section 15 provides that the discharge shall not be granted till a certificate is obtained from the circuit recruiting commission (*Kreis-Ersatz-Commission*) showing that the discharge is not sought for the sole purpose of evading service in the standing army or navy. (Report by Mr. Coleman, sec. of leg., For. Rel. 1892, 181.)

#### (4) GREECE.

#### § 444.

“It is presumed that Greece, like most other governments in Continental Europe, has a municipal law requiring military service from its subjects even when naturalized abroad, unless the claim to that service shall have been relinquished or modified by treaty. Unfortunately for Mr. Vaccas, as the United States has no such treaty with Greece, it is not likely that any representation which this Government might make would accomplish the object which you seek [the release of Mr. Vaccas from arrest on a charge of having evaded military service]. And even were this probable this Government has no diplomatic representative at Athens, through an officer of which character alone could a correspondence upon the subject be properly conducted.”

Mr. Blaine, Sec. of State, to Mr. Wolf, Nov. 28, 1881, 139 MS. Dom. Let. 606.

Louis Economopoulos, a native of Greece, emigrated in 1893, in his 16th year, to the United States, where he was duly naturalized in August, 1899. In the following month he returned to Greece for a

temporary sojourn, as he alleged, on account of the illness of his father. On his arrival in Greece he was arrested and put into the army. The American legation applied for his release, but, as he had changed his name in America from Leonidas to Louis, the war office declined to consider the case on the ground of want of proof of identity. This difficulty having been removed, the foreign office stated that he could not be released on the ground of his American naturalization, since he had not fulfilled the conditions of the Greek constitution, by which the assent of the King is essential to the relief of a Greek subject from his obligation.<sup>a</sup>

In reply Mr. Hardy, United States minister at Athens, cited the following precedents in support of his application:

A. M. Cassimus, born in Greece in 1862, emigrated to the United States in 1873, and was naturalized in 1884. Returning in the same year on a visit to Greece, he was arrested and taken to Corfu, where, on the interposition of the American consular agent, he was, on proof of citizenship, discharged, and his name erased from the conscription rolls.

E. C. Catechi,<sup>b</sup> a native Greek, emigrated in 1872, at the age of 14, to the United States, and was naturalized in 1879. Returning to Greece in 1885 to visit his parents he was conscripted, but on proof of American naturalization was released. In 1886, his name not having been stricken from the rolls, he was again arrested, but was released on the interposition of the consular agent at Corfu. Being again conscripted in 1890, he was finally discharged on the request of the American minister at Athens.<sup>c</sup>

D. N. Vasilatos, who emigrated to the United States in 1880, and was naturalized in 1893, revisited Greece in 1897, when, having been conscripted, he was, on the informal request of the legation, discharged, and his name erased from the rolls.

G. Dragoman, who, after service in the United States Navy, was naturalized in 1891, was, when arrested at the Piraeus, in 1898, released on a similar request.

Two other natives of Greece—E. Xanthakos and P. Cutzenis—naturalized in the United States, were released on the interposition of the legation, the first in 1895 and the second in 1896.<sup>d</sup>

As the citation of these cases failed to secure a favorable response, Mr. Hardy invoked, without success, two decisions of the Legal Council on Doubtful Administration, June 14, 1886, which served as the basis of Catechi's discharge, to the effect that a Greek might

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<sup>a</sup> For. Rel. 1900, 634, 638, 640.

<sup>b</sup> For the correspondence in the case of Catechi, see For. Rel. 1890, 511, 513, 514, 515, 516, 519, 520.

<sup>c</sup> For. Rel. 1890, 511.

<sup>d</sup> For. Rel. 1900, 635, 638-639.

change his allegiance without the assent of his sovereign, subject only to the penalties of imprisonment and loss of civil rights prescribed by the penal code.<sup>a</sup>

The Department of State advised Mr. Hardy that he had done all that was practicable in the absence of a naturalization treaty, and instructed him to propose to Greece the negotiation of such a treaty, on the lines of the convention between the United States and Austria-Hungary.<sup>b</sup>

The Greek Government replied, however, that it could conclude a convention only on the basis of a communication from the war office, in which it was declared that, while permission to change allegiance would be freely granted, it could not be obtained unless the applicant had "satisfied his military obligations and discharged the duties which he might eventually incur toward the state;" that the acquisition of foreign nationality in no wise relieved Greek subjects from military duty, since, if it were otherwise, "anyone who wished to evade military service in Greece would only have to become naturalized abroad;" that whosoever became naturalized abroad without permission was subject to the penalties of the penal code, and, as to any evasion of military service, to punishment under military law as a deserter; and that, in order to avoid misunderstandings, it would be necessary to arrange by an exchange of notes that every Greek subject desiring to acquire American nationality should deposit with the American authorities a certified copy of the royal decree authorizing him to abandon his Greek allegiance.<sup>c</sup>

The United States declined to conclude a convention, unless it should "recognize the right of the individual to change his allegiance."<sup>d</sup>

The Greek Government adhered to its position in the case of Economopoulos, although, in another and similar case, the minister of foreign affairs forestalled the arrest of the individual by a personal letter to the local authorities. Mr. Hardy therefore, as stated by him in a dispatch of Oct. 2, 1900, advised Economopoulos, in view of the decisions of 1886, to try an appeal to the Legal Council, but on account of the expense or for some other reason he did not

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<sup>a</sup> For. Rel. 1900, 637, 640-641. The minister of foreign affairs afterwards maintained that these decisions were applicable only to the cases in which they were made, and established no general principle, and that they were besides unconstitutional and rendered liable to impeachment the ministry which enforced them. (For. Rel. 1900, 646-647.)

<sup>b</sup> Mr. Hay, Sec. of State, to Mr. Hardy, min. to Greece, April 6 and April 13, 1900, For. Rel. 1900, 641, 642.

<sup>c</sup> For. Rel. 1900, 643-644.

<sup>d</sup> Mr. Hay, Sec. of State, to Mr. Hardy, min. to Greece, June 6, 1900, For. Rel. 1900, 644.

do so, and remained in the military service. The Department of State, in reply, instructed Mr. Hardy that he had, under the circumstances stated in his dispatch, done all that he could properly do in Mr. Economopoulos' behalf.<sup>a</sup>

March 27, 1901, Mr. Charles S. Francis, United States minister at Athens, wrote a personal letter to the Greek minister of war, reciting the circumstances of the case and saying that, while there was no naturalization treaty between the two countries, it was believed that the minister's "sense of justice" and considerations of "comity" would lead to the discharge of the person in question, in order that he might return to the country of his adoption.

March 29, 1901, the minister of war replied that the laws of the country did not permit him to strike Economopoulos from the roll of conscripts and order his dismissal from the army, but that he would order his discharge from the ranks if he could find any reason of health or of family that would justify him in so doing. He was actually discharged from the service June 25, 1901.<sup>b</sup>

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"The Greek Government does not, as a general statement, recognize a change of nationality on the part of a former Greek without the consent of the King, and a former Greek who has not completed his military service and who is not exempt therefrom under the military code may be arrested upon his return to Greece. The practice of the Greek Government is not, however, uniform, but American citizens of Greek origin are advised to find out before returning what status they may expect to enjoy. Information should be sought directly from the Greek Government, and this Department always refuses to act as intermediary in seeking the information.

"There is no treaty on the subject of naturalized citizens between the United States and Greece."

Circular Notice, Department of State, Jan. 31, 1901, For. Rel. 1901, 247.

(5) GUATEMALA.

§ 445.

In the case of Mr. Leon Aparicio, the Guatemalan Government seems to have taken the ground that a person born in France, of Guatemalan parents, by the laws of Guatemala was not entitled to be

<sup>a</sup> Mr. Hay, Sec. of State, to Mr. Hardy, min. to Greece, Oct. 24, 1900, For. Rel. 1900, 647.

<sup>b</sup> For. Rel. 1901, 247-249.

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<sup>a</sup> Mr. Hay, Sec. of State, to Mr. Hardy, min. to Greece, Oct. 24, 1900, For. Rel. 1900, 647.

<sup>b</sup> For. Rel. 1901, 247-249.



"I have to acknowledge the receipt of your dispatch No. 729 of the 19th of January last, relative to the case of Lieutenant Lornia, in which you observe that the promulgation of an amnesty by the new King of Italy, embracing a large class of offenses against military law and discipline, will give you an opportunity of asking the release of the American citizens now held to military service in Italy, as perhaps coming within the principle of the amnesty, and that you shall avail yourself of the occasion in your next interview with the Minister of Foreign Affairs. Trusting that your efforts in the direction stated will be successful, I am," etc.

Mr. Evarts, Sec. of State, to Mr. Marsh, min. to Italy, Feb. 11, 1878, MS. Inst. Italy, II. 54.

"It is understood the law of Italy makes no exception in favor of its subjects naturalized abroad, in requiring from them service in the army, if found within Italian jurisdiction. As the United States has no naturalization treaty with Italy, the local laws must prevail." (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Wilson, March 20, 1878, 122 MS. Dom. Let. 230.)

To the same effect, Mr. F. W. Seward, Act. Sec. of State, to Mr. Cassasa, Nov. 29, 1878, 125 MS. Dom. Let. 408.

In the case of Mr. Largomarsino, a naturalized American citizen of Italian origin, who was enrolled in the Italian army upon his return to his native country, the Italian minister of foreign affairs informed Mr. Marsh, the American minister at Rome, that it was not possible to make exceptions to the law, adding that "Article 12 of the Civil Code of the Kingdom explicitly enacts that the loss of citizenship does not carry with it exemption from the obligation of military service. Matters of private interest, which, in fact, are common to all Italian citizens on whom military service is incumbent, are not taken into consideration by the laws of conscription. The Royal Government cannot, therefore, hold them of any weight."

For. Rel. 1878, 458; 1879, 600.

Mr. Evarts, writing, as Secretary of State, to Mr. Marsh, minister to Italy, Feb. 26, 1879, as to the foregoing case, instructed him "to take such action as in your judgment will tend to the best result." (MS. Inst. Italy, II. 87.)

The statement of the Italian minister of foreign affairs is cited in Mr. Porter, Act. Sec. of State, to Mr. Collins, Sept. 21, 1885, where it is said: "As a matter of practice this rule has been strictly enforced." (156 MS. Dom. Let. 178.)

See, to the same effect, Mr. Bayard, Sec. of State, to Mr. Blanchard, July 22, 1885, 156 MS. Dom. Let. 330.

Art. 11, Tit. I., of the Italian Civil Code of 1866, declares: "Citizenship is lost . . . by naturalization in a foreign country."

Art. 12, however, provides: "Loss of citizenship in the cases stated in the preceding article does not exempt from the obligations of military service, nor from penalty inflicted on anyone who bears arms against his native country." The contention of the Italian Govern-

ment appears to be that the obligation of military service, accruing before naturalization, is a personal obligation to be discharged if the party return to Italian jurisdiction, unless he be found exempt by reason of age or personal infirmity. (Mr. Wharton, Act. Sec. of State, to Mr. Lewis, August 5, 1890, 178 MS. Dom. Let. 505.)

Mr. Dougherty, chargé at Mexico, enclosed to the Department of State with his No. 1084 of Oct. 14, 1892, a copy and translation of a treaty on nationality between Italy and Mexico, the ratifications of which were exchanged Aug. 17, 1892. (114 MS. Desp. from Mexico.)

"If, as you write, you are a citizen of the United States, this Government will require of the Government of Italy, of which country you say you are a native, any rights which may have been conceded to the United States by treaty, or which may be due to their citizens pursuant to public law. There is no naturalization treaty between this Government and that of Italy; but it is the purpose of this Government to insist in such cases that a naturalized citizen is entitled to the same exemption from military service as our native citizens would be in like circumstances. It is proper, however, that you should be informed that the Government of Italy is understood to claim that, in the absence of a treaty, the rights of a naturalized Italian there must be regarded as governed by the municipal law, which, as is supposed, does not exempt Italian born, naturalized abroad, from service in the army of Italy."

Mr. Evarts, Sec. of State, to Mr. Ennis, Feb. 7, 1879, 126 MS. Dom. Let. 370.

"The experience of the Department is that natives of Italy returning there, and held to service in the army by Italian law, are required to complete the term of such service. If you are naturalized citizens of the United States, you can procure passports which will protect you, so long as you remain outside of the jurisdiction of the Italian Government. Should you, however, venture within such jurisdiction and so be compelled to service in the army, the Department cannot assure you, in the absence of treaty stipulations, that any remonstrance it might make in your behalf would be successful."

Mr. Hitt, Assist. Sec. of State, to Messrs. Donati & Bro., Sept. 5, 1881, 139 MS. Dom. Let. 57.

"The Government of Italy does not recognize foreign naturalization as extinguishing the obligation of its former subjects to military service; nor has that Government any treaty stipulations with the United States which in any way modify the case so far as our citizens are concerned. If, therefore, such native, so naturalized, returns to the jurisdiction to which he was once subject, the American passport which will be given him, on proper application, will ensure the earnest attention of our diplomatic and consular officers in case

there may be any proper opportunity of service to him. The Department cannot, however, guarantee freedom from detention, nor protection and release in case charges are prosecuted, based on conditions preceding the acknowledgment of obligation to the United States."

Mr. Frelinghuysen, Sec. of State, to Mr. De Pierre, Dec. 16, 1883, 149 MS. Dom. Let. 235.

See, also, same to same, Jan. 23, 1885, 154 MS. Dom. Let. 46.

"Information was received here last autumn, from the United States minister at Rome, in the case of a similarly situated native Italian in Kentucky, that such native would be held on his return to Italy as subject to the conscription. The ministry of war at Rome claims that the fact of his having become a citizen of the United States, does not exempt the enquirer, (who, it may be added, was also a minor on the date of his leaving Italy), 'from the obligations that he has toward the military laws' of that country."

Mr. Frelinghuysen, Sec. of State, to Mr. Dunham, Dec. 29, 1884, 153 MS. Dom. Let. 523; and, to the same effect, Mr. Frelinghuysen, Sec. of State, to Mr. Savarese, Feb. 18, 1885, 154 MS. Dom. Let. 276; Mr. Bayard, Sec. of State, to Mr. Casciani, Aug. 20, 1885, 156 MS. Dom. Let. 588; Mr. Bayard, Sec. of State, to Mr. Facchenetti, March 26, 1886, 159 MS. Dom. Let. 428.

The case above referred to, in Kentucky, was that of Mr. Lanciotti, in whose behalf the American minister at Rome was specially instructed to solicit permission to pay a visit to Italy. The Italian minister of war replied: "It is not possible to grant any authorization to this effect, because the fact of having become a citizen of the United States does not exempt Mr. Lanciotti from the obligations that he has toward the military laws of Italy, and for not having complied with them, returning to his native country, he cannot be treated otherwise than as *reintente*," or, as appears, subject to enrollment for the army. (Mr. Bayard, Sec. of State, to Mr. Lanciotti, April 7, 1885, 155 MS. Dom. Let. 3.) See, further, as to Mr. Lanciotti's case, For. Rel. 1884, 336-339.

In view of this case, the Department "cannot . . . encourage such former native subjects to place themselves within the military jurisdiction mentioned." (Mr. Bayard, Sec. of State, to Mr. Oishie, Feb. 4, 1887, 163 MS. Dom. Let. 54; to Mr. Sayers, Feb. 16, 1887, *id.* 168; to Mr. Comba, May 10, 1887, 164 MS. Dom. Let. 127.)

"Under that article [12, Italian Civil Code] the Italian Government, against the earnest protest of this Government, has claimed the right to hold its former subjects to military service in case of their return to Italy, although they have become citizens of this country. (See Foreign Relations, 1890, page 536 et seq.) Signor Damiani, the Italian under secretary of state, states the Italian claim thus: That the duty to serve in the army arises 'from the explicit regulations of the Italian law, which do not exempt from military service anyone who has lost or voluntarily relinquished Italian citi-

zenship.' In proper cases this Government will continue to protest against this claim as it has done heretofore, but in the absence of a treaty stipulation with respect thereto the present prospects of a favorable results are not promising."

Mr. Foster, Sec. of State, to Mr. Mayo, Dec. 19, 1892, 189 MS. Dom. Let. 489, in reply to the inquiry of a naturalized American citizen of Italian origin, who stated that he came to the United States at the age of thirteen. See, in a similar sense, Mr. Foster, Sec. of State, to Mr. Caretti, Jan. 26, 1893, 190 MS. Dom. Let. 131.

The case referred to, in Foreign Relations, 1890, 536 et seq., is that of Nicolino Mileo, which in its earlier stage attracted much attention. It subsequently appeared that some of Mileo's allegations were unfounded, and the correspondence ended with an expression by the Department of State of the hope that a naturalization treaty might be negotiated.

The opinion was expressed that article 12 would not apply to the sons of a naturalized citizen of the United States of Italian origin, who were born in the United States after his naturalization, for the following reasons: Article 4, Title I., of the Civil Code provides that the son whose father is a citizen is likewise a citizen; but article 6 provides: "A person born in a foreign country of a father who has lost his citizenship before the birth of the son, is considered as a foreigner. He may, however, elect Italian citizenship; provided he makes a declaration to that effect according to the foregoing article and establishes his domicile in the Kingdom within a year from the time of such declaration. Nevertheless, if he has accepted a public office in the Kingdom, or has served or is serving in the Italian army or navy, or has otherwise complied with the provisions of the military law without claiming exemption on the ground of his being a foreigner, he shall be considered as a citizen." One of the means designated under article 2 by which Italian citizenship may be lost is that of becoming a citizen of a foreign country. The father, therefore, although he continued, by article 12, to be subject to military obligations, lost by his naturalization in the United States his Italian citizenship; and his children, born in the United States after his naturalization, could not be said to have lost Italian citizenship, or to be subject to any of its obligations, since they never possessed it.

Mr. Foster, Sec. of State, to Mr. Fellows, Nov. 30, 1892, 189 MS. Dom. Let. 308.

See, in the same sense, Mr. Gresham, Sec. of State, to Mr. Cunes, May 18, 1893, 192 MS. Dom. Let. 50; Mr. Olney, Sec. of State, to Mr. Dramis, Jan. 19, 1897, 215 MS. Dom. Let. 282. In the letter last cited, Mr. Olney stated that, so far as the Department was informed, the Italian Government had shown no disposition to extend its military laws "to cover the cases of children of persons of Italian origin born in the United States."

"The Department is not aware, however, that this claim [of military service in Italy] has been extended to the second generation, and if you were born in the United States, it is not thought likely that any claim would be made on you for military service should you visit Italy." (Mr. Day, Assist. Sec. of State, to Mr. Pastorelli, Jan. 18, 1898, 224 MS. Dom. Let. 511.)

The United States declined to enter into a naturalization convention with Italy, which provided (1) that naturalization in the United States should be conferred only on persons who should make application for it, thus denying, at least by implication, the incidental or derivative naturalization of wives and minor children, and (2) that it should not exempt Italians admitted to citizenship in the United States from military duty on returning to their native country.

Mr. Gresham, Sec. of State, to Baron Fava, Italian amb., June 13, 1894, For. Rel. 1894, 364.

See Mr. Gresham, Sec. of State, to Mr. Truda, Aug. 30, 1894, 198 MS. Dom. Let. 442; Mr. Uhl, Act. Sec. of State, to Mr. Valinote, March 14, 1895, 201 MS. Dom. Let. 182.

October 19, 1896, Mr. MacVeagh, ambassador at Rome, brought to the attention of the Italian Government the case of one Vittorio Gardella, a citizen of the United States, who was then performing military service under compulsion in Italy. It appeared that he was born in Italy in 1861 and was taken to the United States when only six years of age. He was naturalized in 1884. He resided in the United States continuously from 1877 to 1895, his home being in the city of New York where he had a wife and family. He was on a visit to Italy when he was drafted into the army.

Mr. Olney, Secretary of State, in writing to Mr. MacVeagh, Nov. 6, 1896, referred to the case of Mileo, printed in For. Rel. 1890, 536-554. The Department, he said, had "little to add to the views expressed in the Mileo case," and, while it would welcome Mr. MacVeagh's endeavors to arrange the matter by treaty, it was not inclined to hope for such a result unless the Italian view should have been materially modified.

Mr. MacVeagh brought the case personally to the attention of the Italian minister for foreign affairs, the Marquis Visconte Venosta, and obtained Gardella's release in the form of a grant of unlimited leave, which did not formally waive the contention of the Italian Government. Indeed, the Marquis Visconte Venosta, in informing Mr. MacVeagh of Gardella's release, observed that while he had no doubt lost his Italian citizenship by virtue of article 11, paragraph 2, of the Italian Civil Code, he nevertheless remained "liable to military service in the Kingdom, according to the peremptory provisions of the succeeding article 12," and that the case of Gardella had been

disposed of "in an exceptional way" in view of his exceptional situation, of certain amendments which were expected to be made in the law regulating the levy of persons residing abroad when enlisted, and of the interest which Mr. MacVeagh took in the case.

For. Rel. 1896, 423-426.

See Mr. Olney, Sec. of State, to Mr. O'Brien, Nov. 16, 1895, 206 MS. Dom. Let. 81; to Mr. Dondero, Nov. 22, 1895, 206 MS. Dom. Let. 156.

"Should you voluntarily return to Italy, you will place yourself within the jurisdiction of the Italian law, and while, if you should be held for military service, our embassy at Rome would, on proof of your American citizenship, intervene in your behalf, the success of the intervention can not be foreseen."

Mr. Olney, Sec. of State, to Mr. Dondero, Nov. 22, 1895, 206 MS. Dom. Let. 156.

To the same effect, see Mr. Day, Assist. Sec. of State, to Mr. Magnano, Oct. 6, 1897, 221 MS. Dom. Let. 346; Mr. Adey, Second Assist. Sec. of State, to Mr. d'Esopo, Oct. 26, 1897, 222 id. 16; Mr. Moore, Act. Sec. of State, to Mr. Reiss, Aug. 29, 1898, 231 id. 147; Mr. Moore, Assist. Sec. of State, to Mr. Ruggiero, Sept. 13, 1898, 231 id. 342; Mr. Hill, Assist. Sec. of State, to Mr. Vietro, Dec. 14, 1898, 233 id. 261; to Mr. Strasbourg, June 30, 1900, 246 id. 207.

In December, 1897, Giuseppe Bruno, a naturalized American citizen of Italian origin, was impressed into the Italian army. May 9, 1898, the American ambassador at Rome was instructed to use his "good offices" to obtain Bruno's release. "This he has been and is doing." (Mr. Hill, Assist. Sec. of State, to Mr. Smith, Oct. 27, 1898, 232 MS. Dom. Let. 405.)

"It is thought . . . that if you were to address a petition directly to the Government of His Majesty the King of Italy, stating the circumstances of your case, you might obtain its consent to your change of allegiance, and, in view of your ill health, release from any claim to military service. Copy of your letter will be forwarded to our ambassador at Rome, and he will be instructed to use his good offices in aid of your petition." (Mr. Hill, Assist. Sec. of State, to Mr. Vietro, Dec. 14, 1898, 233 MS. Dom. Let. 261.)

The collection of a legacy in Italy is a private matter which should be arranged through an agent of the claimant's own choice. (Mr. Hill, Assist. Sec. of State, to Mr. Cereghino, Nov. 6, 1900, 249 MS. Dom. Let. 2.)

"The information given below is believed to be correct, yet it is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Italian subjects between the ages of 20 and 39 years are liable for the performance of military duty under Italian law, except in the case of an only son, or where two brothers are so nearly of the same age that both would be serving at the same time, in which event only

one is drafted, or when there are two sons of a widow, when only one is taken.

"Naturalization of an Italian subject in a foreign country without consent of the Italian Government is no bar to liability to military service.

"A former Italian subject may visit Italy without fear of molestation when he is under the age of 20 years; but between the ages of 20 and 39 he is liable to arrest and forced military service, if he has not previously reported for such service. After the age of 39 he may be arrested and imprisoned (but will not be compelled to do military duty) unless he has been pardoned. He may petition the Italian Government for pardon, but this Department will not act as the intermediary in presenting his petition."

Notice to citizens formerly subjects of Italy who contemplate returning to that country, March 18, 1901, For. Rel. 1901, 282

(7) MOROCCO.

§ 447.

"In regard to your obligations in respect to Moorish subjects naturalized here who may return to Morocco, I have to remark that you will, under the treaty of 1836, claim for them the same privileges and immunities as may be enjoyed by the citizens or subjects of any other power who also may have been natives of Morocco, unless the Government to which citizens or subjects may owe allegiance shall have a treaty of naturalization with the Emperor. The United States has no such treaty."

Mr. Evarts, Sec. of State, to Mr. Mathews, consul at Tangier, Dec. 7, 1877, MS. Inst. Barb. Powers, XV. 348.

"Any subject of Morocco who has been naturalized in a foreign country, and who shall return to Morocco, shall, after having remained for a length of time equal to that which shall have been regularly necessary for him to obtain such naturalization, choose between entire submission to the laws of the Empire and the obligation to quit Morocco, unless it shall be proved that his naturalization in a foreign country was obtained with the consent of the Government of Morocco.

"Foreign naturalization heretofore acquired by subjects of Morocco, according to the rules established by the laws of each country, shall be continued to them as regards all its effects, without any restrictions."

Art. 15, Madrid Convention, July 3, 1880, to which the United States is a party.

It was stated, in 1900, that this article, so far as it required a native of Morocco, who had been naturalized abroad without the consent of his

Government, and who had afterwards returned to Morocco and resided there during a term equal to that which was required for his admission to citizenship in the country in which he was naturalized, to elect between entire submission to the laws and the obligation to leave Morocco, had remained a dead letter. "The Department's judgment is that not only is such residence [in Morocco] a prerequisite [to the election in question], but when not coupled with a declaration of the citizen of his renunciation of his new and resumption of his old, he must be presumed to have retained his acquired allegiance, and that the Government of Morocco, by reason of its non-action to enforce an expression of the treaty provision by the foreigner, is compelled by a fair and impartial construction of that instrument to assent to that contention." (Mr. Cridler, Third Assist. Sec. of State, to Mr. Gummere, consul-general at Tangier, No. 227, Nov. 27, 1900, 175 MS. Inst. Consuls, 271.)

(8) THE NETHERLANDS.

§ 448.

In 1873 a native of the Netherlands, being then seventeen years old, went to the United States, intending to remain there. His parents continued to live in the Netherlands, and when the proper time came he was drafted for military service; and, as he did not appear, it was reported that he was declared a deserter. Subsequently, when he desired to revisit his original home, he found that he would be liable to arrest. Meanwhile, he had become a citizen of the United States, and was a minister of the Reformed Dutch Church. In 1887 he requested the American legation at The Hague to consider his case. The legation submitted it to the Dutch Government, which replied that the person in question was not a deserter, but a conscript who neglected to present himself for enrollment in 1876 in his proper commune, and who was in consequence advertised in the *Police Gazette* in 1877; that, in case he should return to the Netherlands, he would be liable to the application of article 172 and succeeding articles of the law of August 19, 1861, by which it was enacted that the conscript who failed to respond to the summons for his incorporation should be brought before the proper provincial authorities, in order that they might inquire into the case and pronounce sentence upon it. If the conscript should be found fit for service he was incorporated for five years, no matter what his age might be, and he was kept to his colors during this whole time, unless the provincial authorities had decided that he was prevented by circumstances beyond his control from complying with the summons. Such a person might, however, provide a substitute in the usual way, but such substitute must remain with the colors during the period prescribed for his principal.



Mr. Bell, min. to the Netherlands, to Mr. Bayard, Sec. of State, March 15, 1887, For. Rel. 1887, 894. Cited in Mr. Foster, Sec. of State, to Mr. Weyle, Oct. 14, 1892, 188 MS. Dom. Let. 508.

See Mr. Evarts, Sec. of State, to Mr. Goodheart, March 20, 1879, 127 MS. Dom. Let. 239; Mr. Blaine, Sec. of State, to Mr. Kommers, Feb. 19, 1890, 176 Id. 450.

The Dutch law of citizenship, which took effect July 1, 1893, contains the following provision:

"ART. 7. Netherlands citizenship shall be forfeited—

"(a) When a Dutch subject becomes naturalized in a foreign country, or in case of minors by participation in the naturalization of either father or mother.

"(b) By marriage in the case of a woman.

"(c) By voluntary naturalization in a foreign country.

"(d) By entering the service or army of a foreign power without special royal permission.

"(e) By residence outside Dutch territory, provided such residence be not in an official capacity, for a period exceeding ten consecutive years, in cases where the person in question fails to notify the burgo-master or proper authority of the place where he last resided in the Kingdom, its colonies, or possessions in other parts of the world, or in lieu thereof the Dutch minister or consular official in the foreign country, that it is not his intention to abandon citizenship.

"Such notification dates the commencement of a new period of ten years.

"The ten-years period shall commence for minors from the day on which they attain majority according to the Dutch law."

For. Rel., 1893, 474.

Mr. Dewes Valk, a native of the Netherlands, served in the Dutch army from May, 1866, till July, 1867, when he went to his home, in the province of Groningen, on leave of absence. He afterwards accompanied his parents to the United States, where in due time he was naturalized. He was informed that on February 1, 1870, he was declared by the war department of the Netherlands to be a deserter, but he had understood that by a law passed in 1897 an absence of twelve years from the Netherlands exempted a deserter from prosecution. Being desirous of revisiting his native country, he drew up a petition to the Dutch minister of war, praying that such action might be taken as would enable him to make the visit without molestation. The minister of the United States at The Hague was instructed to bring the matter informally to the attention of the minister of war, with a view to having such action taken as might be found proper under all the circumstances.

Mr. Day, Sec. of State, to Mr. Newel, No. 131, July 1, 1898, MS. Inst. Netherlands, XVI. 366.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"A subject of the Netherlands is liable to military service from his nineteenth to his fortieth year. He must register to take part in the drawing of lots for military service between January 1 and August 31 of the calendar year in which he reaches the age of 19. He is exempt, however, from service if he is an only son or is physically disabled; and in the case of a family half of the brothers are exempt, or the majority if the number is uneven.

"No military service is required of one who became a citizen of the United States before the calendar year in which he became 19 years of age, and a Netherlands subject who becomes a citizen of the United States when he is 19 and between January 1 and August 31 may have his name removed from the register by applying to the Queen's commissioner of the province in which he was registered. If he does not have his name removed from the register, or if he becomes a citizen of the United States after the register is closed (August 31) and his name is drawn for enlistment, his naturalization does not affect his military obligations to the Netherlands, and if he returns he is liable (1) to be treated as a deserter if he did not respond to the summons for service or (2) to be enlisted if he is under 40.

"Former Netherlands subjects are advised to ascertain, by inquiry from the Netherlands authorities, what status they may expect to enjoy if they return to the Netherlands. This Department, however, uniformly declines to act as the intermediary in the inquiry."

Circular notice of the Department of State, Aug. 30, 1901, For. Rel. 1901, 418.

(9) NICARAGUA.

§ 449.

Mr. Donaldson, United States consul at Managua, Nicaragua, in his No. 12, June 15, 1898, reported that President Zelaya had granted Dr. Victor Roman, a naturalized citizen of the United States of Nicaraguan origin, a year in which to arrange his business and return to the United States, on pain, if he remained in Nicaragua after that time, of being considered a citizen of that country. Mr. Donaldson enclosed an extract from the Revised Laws of Nicaragua, under the head of Aliens, chapter 3, as follows: "Article 32. . . . Nicaraguans naturalized in a foreign country remain subject to the nationality of Nicaragua always when residing in the territory of Nicaragua."

The Department of State said: "In the absence of a treaty of naturalization, the only recourse in favor of Dr. Roman is one of friendly concession by the Nicaraguan Government."

Mr. Day, Sec. of State, to Mr. Merry, min. to Nicaragua, No. 89, May 9, 1898, MS. Inst. Cent. Am. XXI. 316.

See, also, Mr. Day, Sec. of State, to Mr. Quay, U. S. S., July 6, 1898, 230 MS. Dom. Let. 46.

(10) PERSIA.

§ 450.

The position of Persia, as an adherent of the doctrine of indelible allegiance, was defined in the case of Hajie Seyyah, a native subject, who had been naturalized in the United States. In a note to the minister of the United States at Teheran, Nov. 19, 1893, the Persian prime minister declared: "Hajie Seyyah, of Mahallât, is a veritable subject of Persia whether he be resident in Persia or he depart for a foreign land. Under no circumstances can there be any change in his nationality, and wherever he may be he will be a citizen of Persia. I send this reply so that there may be no objections raised in the future."<sup>a</sup>

The Department of State answered: "You may say to the minister of foreign affairs that so far as the case of Hajie Seyyah is concerned the incident was terminated by the announcement that this Government was indisposed to regard him as entitled, under all the circumstances of the case, to protection as a person *bona fide* conserving his acquired rights as a citizen of the United States.

"This being so, it does not appear to be necessary or expedient to discuss the abstract question of the right and duty of the Government of the United States toward its lawful citizens."

Mr. Uhl, Acting Sec. of State, to Mr. McDonald, min. to Persia, Jan. 5, 1894, For. Rel. 1893, 508.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Permission to be naturalized in a foreign country is not granted by the Persian Government to a Persian subject if he is under charge for a crime committed in Persia, or is a fugitive from justice, or a deserter from the Persian army, or is in debt in Persia, or fled to avoid pecuniary obligations.

"If a Persian subject becomes a citizen of another country without the permission of the Persian Government he is forbidden to

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<sup>a</sup> For. Rel. 1893, 507.

reenter Persian territory, and if he had any property in Persia he is ordered to sell or dispose of it.

"There is no treaty between the United States and Persia defining the status of former Persian subjects who have become naturalized American citizens."

Circular notice, Department of State, Washington, Feb. 18, 1901, For. Rel. 1901, 424.

(11) PORTUGAL.

§ 451.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Military service is obligatory upon Portuguese male subjects, but by becoming naturalized in a foreign country a Portuguese loses his qualifications as such.

"On returning to the Kingdom with the intention of residing in it he may reacquire Portuguese subjection by requesting it from the municipal authorities of the place he selects for his residence. Not making this declaration he remains an alien and is not subject to military duty.

"If a Portuguese leaves Portugal without having performed the military duty to which he was liable and becomes naturalized in a foreign country, his property is subject to seizure, and that of the person who may have become security for him when he left the Kingdom is equally liable. There is no treaty between the United States and Portugal defining the status of former Portuguese subjects who have become naturalized American citizens."

Circular notice, Department of State, Washington, Feb. 11, 1901, For. Rel. 1901, 439.

"A protracted examination of the files of this Department discloses no case of complaint by reason of the impressment into the Portuguese military service of a naturalized citizen of Portuguese origin, returning to that country." (Mr. Adee, Second Asslt. Sec. of State, to Mr. Costa, Oct. 23, 1897, 221 MS. Dom. Let. 622.)

(12) ROUMANIA.

§ 452.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"All male inhabitants of Roumania, except those under foreign protection, are liable to military duty between the ages of 21 and 30 years.

"American citizens formerly Roumanian subjects are not molested upon their return to Roumania, unless they infringed Roumanian law before emigrating. One who did not complete his military service in Roumania, and can not prove that he performed military service in the United States, is subject to arrest, or fine, or both, for evasion of military duty.

"There is no treaty between the United States and Roumania defining the status of naturalized Americans of Roumanian birth returning to Roumania."

Circular notice, Department of State, Washington, Feb. 20, 1901, For. Rel. 1901, 441.

(13) RUSSIA.

§ 453.

In 1867 Mr. Seward presented to the Russian minister at Washington a draft of a convention of naturalization, and expressed the hope that the Russian Government would accept it, not only as a means of regulating the subject between the two countries, but also as an example and incentive to other governments to conclude similar arrangements with the United States.

Prince Gortchakow declined the proposal on the ground that it was the policy of Russia to forbid the return of her subjects who might choose to abandon her protection and escape from their allegiance.

Mr. Seward addressed to the Russian minister a long expostulatory argument against this position, but without result.

Mr. Seward, Sec. of State, to Mr. Stoeckl, Russ. min., Sept. 9, 1867, MS. Notes to Russ. Leg. VI. 221; Mr. Stoeckl to Mr. Seward, Dec. 28, 1867, and Sept. 14/26, 1868, 6 MS. Notes from Russ. Leg.; Mr. Seward to Mr. Stoeckl, Oct. 5, 1868, MS. Notes to Russ. Leg. VI. 263.

In October, 1864, Bernard Bernstein, who was born in Russian Poland in 1823, and who emigrated to the United States in 1845 or 1846, owing military duty to Russia, was arrested in that country and imprisoned on a charge of having failed to perform military service. On the sixth day after his arrest he wrote to the Department of State, and the Department, Nov. 29, 1864, instructed the legation at St. Petersburg to take steps to secure his release. He was altogether discharged in March, 1865, in consideration, it was believed, of his American citizenship, which he acquired by naturalization in 1856. His actual imprisonment lasted only several days. The Department of State afterwards declined to make a claim for indemnity. (Mr. Fish, Sec. of State, to Messrs. Shorter & Brother, March 13, 1873, 98 MS. Dom. Let. 129, enclosing a copy of the Department's circular of May, 1871, containing information as to the system of military conscription in various European countries.)

Bernstein's case formed the subject of a report to Congress. (Message of President Grant, Feb. 8, 1873, II. Ex. Doc. 197, 42 Cong. 3 sess.)

Mr. Fish, replying to an inquiry concerning the treaty relations between the United States and Russia, and the treatment of naturalized citizens of the one country on their return to the other, the latter being their country of origin, said: "We have no special treaty with Russia on this subject, nor is this Department informed as to her laws or practice in such cases. The friendly disposition manifested by Russia towards this Government would lead it to entertain the hope that its citizens, who conduct themselves properly in that country, would be allowed to travel therein without molestation."

Mr. Fish subsequently stated, however, in the case of a native of Russian Poland, that the United States could not guarantee him against detention and annoyance on his return to his native country, if he was by its laws liable to military service.

Mr. Fish, Sec. of State, to Mr. Bednawsky, May 4, 1869, 81 MS. Dom. Let. 58; Mr. Fish, Sec. of State, to Mr. Marks, Feb. 24, 1870, 83 MS. Dom. Let. 333.

"The Department has received your despatch No. 180, of the 7th instant, relative to the case of Casimir Kachelski, who you say has been sentenced by a court at Warsaw to be banished to Siberia for becoming naturalized as a citizen of the United States. It seems obvious that that part of the sentence, at least, which is based upon the allegation that Kachelski voluntarily left his native country, is erroneous in point of fact, for, having been a minor when he was sent to Breslau in Silesia for his education, he was legally and actually subject to the will of his parent, and by his obedience thereto cannot properly be accused of having left Poland of his own accord. It is presumed that the Russian law to which you refer prohibits the subject of that Empire from becoming naturalized anywhere. It cannot be believed that it pointedly forbids them from becoming citizens of the United States. If it did, both the enactment and carrying into effect of such a law must be regarded as derogatory to the dignity of this Government and as requiring a remonstrance as being incompatible with those friendly relations which we are desirous of keeping up.

"The Department concurs with you that the proper course for Kachelski to pursue, under existing circumstances, would be to petition the Emperor for his pardon. You will in that event support the petition by such representations as you may suppose would be most likely to ensure its success."

Mr. Fish, Sec. of State, to Mr. Schuyler, chargé at St. Petersburg, No. 144. May 28, 1872, MS. Inst. Russia, XV. 327.

See, in a similar sense, Mr. Evarts, Sec. of State, to Mr. Foster, min. to Russia, Jan. 18, 1881, MS. Inst. Russia, XVI. 177; Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Hoffman, chargé, Dec. 29, 1881, MS. Inst. Russia, XVI. 256.

"With respect to this Government being able to guarantee you from 'annoyance' in the event of your return to the country of your original allegiance, I must observe that this Government has neither the occasion nor the power to interpret the local laws of Russia with respect to the military duty of Russians naturalized abroad and returning to Russia, and that it is consequently impossible to predict whether you may or may not be molested on that account. In case of molestation, this Government would extend to you all possible protection in like manner as to a native-born citizen of the United States. But, it must not be forgotten that, in the absence of a specific treaty of naturalization, the personal status of a native-born American citizen, and of a Russian who has been naturalized in the United States, may be very different in Russia. The former has clearly never incurred any obligation under the laws of that country, and incurs none by going thither other than that of peaceful observance of the laws of the land. The latter, on the contrary, while yet a Russian, may, under Russian laws, have contracted personal obligations towards his native land, which under those laws may not be extinguished by the fact of leaving the country and acquiring status elsewhere as a citizen or subject of another country. In such case, if an individual so circumstanced with respect to Russian law were to return to that country and voluntarily put himself within its jurisdiction, it is probable that he would be held to the fulfilment of that personal obligation, in like manner as he would be held to discharge any other personal indebtedness cognizable under Russian law. This is the case in other countries, especially in Italy, where cases of this character have arisen affecting Italians naturalized abroad, who have been held to the completion of their personal obligation of military service without redress being practicable.

"The Department has no means of knowing what personal obligations you may have contracted under Russian law, prior to your naturalization and while yet a Russian subject, and it must therefore decline to express any opinion on this point."

Mr. Evarts, Sec. of State, to Mr. Cronstine, March 17, 1880, 132 MS. Dom. Let. 212.

A native Russian, naturalized in the United States, being desirous to return to his native country, the Department of State said: "As there is no naturalization treaty with Russia, you will be subject to the laws of that Empire within its jurisdiction. Your best course would be formally to petition the Czar for official leave to return." (Mr. F. W. Seward, Assistant Secretary of State, to Mr. Minger, Feb. 23, 1878, 122 MS. Dom. Let. 2.)

In the absence of a treaty of naturalization between the United States and Russia, the success of any attempt on the part of the United States to secure the release of a naturalized American citizen of Russian origin "from the natural operation of the laws of Russia

regarding the obligations of its native citizens," in case he should place himself within Russian jurisdiction, "would be at least problematical." (Mr. Hunter, Second Assistant Sec. of State, to Mr. Siller, Jan. 29, 1879, 126 MS. Dom. Let. 281.)

There being no naturalization treaty between the United States and Russia, "the respective rights of the citizens of the two countries rest on international law and comity. I do not understand that a Russian, naturalized abroad and returning to Russia, is *ipso facto* claimed as a Russian. He may, in determinate cases, be held liable to military duty, or to punishment for non-fulfilment of service due when he emigrated. With regard to such cases the Department abstains from any opinion in advance of an actual instance presenting itself for consideration. If a case arises every possible step is taken to defend bona fide American citizenship.

"Generally, however, a law-abiding naturalized Russian returning to Russia and there obeying the laws and justifying his American citizenship in good faith, goes unmolested during any reasonable period of sojourn unless actually liable to military duty or penalty.

"I can not undertake to say what is the Russian law concerning estates falling to alien heirs. That is a personal matter, in regard to which Mr. Staub should seek competent legal advice."

Mr. Blaine, Sec. of State, to Mr. Randall, M. C., June 8, 1881, 137 MS. Dom. Let. 667.

"Even in questions of citizenship affecting the interests of naturalized citizens of Russian origin, the good disposition of the Imperial Government has been on several occasions shown in a most exemplary manner; and I am sure the actual counselors of His Majesty cannot but contemplate with satisfaction the near approach made in 1874 to the arrangement of negotiations for a treaty of naturalization between the two countries. On that occasion, as will be seen by consulting Mr. Jewell's No. 62, of April 22, 1874, the only remaining obstacle lay in the statutes of the Empire touching the conferment and loss of citizenship, of which the examining commission and the consultative council of state recommended the modification in a sense compatible with the modern usage of nations."

Mr. Blaine, Sec. of State, to Mr. Foster, min. to Russia, No. 87, July 29, 1881, For. Rel. 1881, 1030, 1034.

By the laws of Russia, a Russian subject who becomes naturalized abroad, and afterwards revisits his native country, "is liable to prosecution for any offence which he may have previously committed against the laws of that Empire, including that of unlicensed naturalization in a foreign country." If he has been naturalized in the United States, and, on voluntarily returning to Russia, is arrested on



the charge of unauthorized expatriation, the American legation at St. Petersburg will be instructed to do what it properly can for his relief, in the direction of protecting him from loss of liberty or damage in property.

Mr. Hitt, Act. Sec. of State, to Mr. Pierczynski, Oct. 3, 1881, 139 MS. Dom. Let. 208; Mr. Hitt, Act. Sec. of State, to Mr. Hoffman, chargé Oct. 3, 1881, MS. Inst. Russia, XVI. 240.

“As a naturalized American citizen, you would, if provided with a passport, be entitled to all the protection due to a native-born American citizen. This does not imply that you would be free from molestation should you return to your native country [Russia], and it is not improbable that you would be subjected to various inconveniences, perhaps to arrest. In this case every effort would be exerted in your behalf by the diplomatic and consular officers of the United States, though it is impossible to say with what result. You yourself must, of course, be the judge of the advisability of the visit you contemplate.”

Mr. Davis, Asslt. Sec. of State, to Mr. Newding, Feb. 14, 1883, 145 MS. Dom. Let. 529.

“I have to observe upon the subject that the Russian Government does not admit the right of expatriation, but holds that a Russian subject who leaves Russia without the permission of the Emperor breaks the laws of his country, and the code provides punishment therefor.

“Russia has no treaty stipulations with the United States which in any way modify the case so far as our citizens are concerned. If, therefore, one of these returns to the jurisdiction of the offense which had been entirely committed before his naturalization here, the American passport which will be given him on proper application will assure the earnest attention of our diplomatic and consular officers in case there may be any proper opportunity of service to him. The Department cannot, however, guarantee freedom from detention, nor protection and release in case charges are there prosecuted, for infractions of Russian law committed by the individual while a Russian subject and before any obligation was acknowledged by him to the United States.”

Mr. Frelinghuysen, Sec. of State, to Mr. Halpern, Nov. 27, 1883, 149 MS. Dom. Let. 20; Mr. Frelinghuysen, Sec. of State, to Mr. Turrill, March 19, 1884, 150 MS. Dom. Let. 325; Mr. Frelinghuysen, Sec. of State, to Mr. Kaufman, Feb. 10, 1885, 154 MS. Dom. Let. 202.

See, also, Mr. Frelinghuysen, Sec. of State, to Mr. Adler, April 14, 1883, 146 MS. Dom. Let. 429.

"From the responses previously made to your inquiries in Mr. Wagner's behalf, it appears that the brunt of the charge against him was that he, a minor, quitted Russian jurisdiction in advance of attaining the age when he might be called upon for military service. He was born at Lodz in 1852, and in 1874 became liable to military service. He came to the United States in 1869, five years before the liability could rest upon him. When the technical offense, styled 'evasion of military duty,' which is the sole charge against him, began to exist as a tangible accusation, Reinhardt Wagner had already, by residence in the United States for more than three years preceding his majority, acquired under our statutes the preliminary rights of citizenship. No nation should assert an absolute claim over one of its subjects under circumstances like these; and it is thought improbable that Russia will persist in such a claim, even if made. There would be no limit to such a pretension; for the taking of a male infant out of Russia might be regarded with equal propriety as an 'evasion' of eventual military service. It is tantamount to asserting a right to punish any male Russian who, having quitted Russian territory and become a citizen of another state, may afterward return to Russia.

"This claim is different from that put forth by some Governments for the completion of military duty fully accruing while the subject is within their jurisdiction, and actually left unfulfilled. It is, for example, claimed that a subject who leaves the country when called upon to serve in the army, and becomes a citizen or subject of another state, may, if he return to the former jurisdiction while yet of age for military duty, be compelled to serve out his term. This rule appears harsh to us, and yet it goes no further, as a matter of fact, than a contention that an obligation of service accruing and unpaid while the subject is a resident of the country, continues, and is to be extinguished in kind by performance of the alleged defaulted service. But, harsh as it is, it is wholly different from the infliction of vindictive punishment, as, for instance, exile for the constructive evasion of an inchoate obligation. To exact the fulfillment of an existing obligation is one thing; to inflict corporal punishment for not recognizing a future contingent obligation is another."

Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, min. to Russia, Dec. 22, 1883, H. Ex. Doc. 88, 48 Cong. 1 sess. 7-8.

This instruction related to the case of Reinhardt Wagner, who was reported to have been exiled to Siberia. It afterwards appeared that he was in the United States. (For. Rel. 1885, 663; *infra*, p. 630.)

Mr. Hunt was informed that the foregoing instruction was "not to be read and communicated to the minister *ipsissimis verbis*," but was to be used in his discretion. (MS. Inst. Russia, XVI. 366.)

See, further, as to Wagner's case, H. Ex. Doc. 100, 48 Cong. 1 sess.

"In reply to your question as to your liability to the military laws of Russia, should you return thither, I observe that the Czar's Government does not admit the right of expatriation to such extent as to secure immunity from the subject's obligations to the laws of Russia, if such subject comes within their jurisdiction. The code provides punishment where such a subject leaves Russia without Imperial permission. . . .

"The passport carried by an American citizen will of course assure the earnest action of our diplomatic and consular officers in his favor, if occasion should arise; but freedom from detention cannot be guaranteed, nor protection or release, in case charges are prosecuted in Russia for infractions of Russian law, committed by the individual while a Russian subject and before any obligation was acknowledged by him to the United States.

"You appear to think your case exceptional in the regard that you left Russia at the age of eleven, or prior to the age of eighteen, but, as a matter of practice in that country, which is of especial concern to you, I may cite a case reported in despatch No. 141, of July 23, 1881, by Mr. Foster, the minister at St. Petersburg. The case was that of Isaac Goldner, who was born in Russia in 1858, but left there in 1870, at the age of twelve. Goldner was naturalized here. In 1880 he returned to Odessa, with an American passport, and was immediately arrested and held for military service.

"The minister strenuously presented the case for the favorable consideration of the Czar's Government, and on several occasions, but without the desired results."

Mr. Bayard, Sec. of State, to Mr. Wolf, March 21, 1885, 154 MS. Dom. Let. 553.

See, also, Mr. Bayard, Sec. of State, to Mr. Harrison, March 14, 1885, 154 MS. Dom. Let. 472; Mr. Bayard, Sec. of State, to Mr. Rosen, April 8, 1885, 155 id. 23; Mr. Porter, Asslst. Sec. of State, to Mr. Barnard, May 29, 1885, id. 530; same to Mr. Johnson, June 4, 1885, id. 571.

"It appears . . . that you were born a subject of Russia, that you left there at the age of sixteen, and have been naturalized as an American citizen. You now propose visiting Europe, and ask 'Can Austria or Prussia hold me as a Russian subject.' . . . As regards your enquiry touching your liabilities in those countries, I have to say, that, according to the understanding of this Department, there exists between them and Russia an arrangement which might lead to the shortening of your stay in either country, provided it were known that you had violated the Russian law in any regard; but it is not supposed that you would be otherwise interfered with there in

any case (except, of course, you were accused of some offence named in the extradition treaties.)”

Mr. Bayard, Sec. of State, to Mr. Firsusi, June 13, 1885, 155 MS. Dom. Let. 692.

“Any Russian going abroad without permission would be liable to punishment on his return home, whether his military duties had been performed or not. Still more severely would he be dealt with if his emigration bore the character of evasion of conscription, and the fact of his becoming a subject or citizen of another state would be ignored in treatment of him, and therefore be inefficient to protect him. The Russian Government has never shown the least disposition to swerve from this principle, and there is no reason to believe that it may be moved to do so by any argument that our Government is able to put forth. It is strongly opposed, on the contrary, to encourage anything that could be interpreted as a mitigation of its laws of conscription or of those on emigration. On this latter point the note of the foreign office, a translation of which accompanied my No. 49, of the 2d instant, on the subject of measures to prevent the immigration into the United States of paupers, indicates the unwillingness of this Government to take any action which might lead to the belief that it does not still forbid emigration. . . .

“In these cases [see note, *infra*] and in others of former years, needless to cite, the Russian Government has shown its intention to assert its power to make its laws respected within its jurisdiction, and it refuses to admit the right of a foreign state to exempt by naturalization its subjects from their unfulfilled prior duties to the land of their birth. The fact of birth in Russia of parents at that time Russian subjects entails upon it duties from which the Government considers itself alone competent to grant absolution. Emigration without permission is regarded as equivalent to desertion, even though the emigrant may be an irresponsible infant, and on the return of such emigrant he is liable to arrest and punishment.

“This Government has, in certain cases, conceded the release of the parties arrested, but this has been done, in the words of Mr. Stoughton, ‘by courtesy, not by right,’ and in order to avoid discussion liable to affect the friendly relations with the Government of the United States.

“It is not likely that the Government of Russia will ever consent to do more than this, release by courtesy, and then only under peculiarly favorable circumstances, in regard to persons of Russian birth, considered by it as still owing military duty, or as having disobeyed the laws of the Empire on emigration, and arrested on their return within its dominions.

"It is difficult to see the way to obtain any redress for the injury to persons thus arrested, or to bring about the recognition of the principle maintained by our Government, as that of Russia repels all advances on our part to regulate the question by means of a treaty of naturalization, towards which overtures were made in April, 1884, by a formal note from this legation in obedience to an instruction from the Department. To this note no written reply has yet been vouchsafed by the Russian foreign office; but verbally it has been given to us to understand that the Imperial Government cannot accept our views of the act of naturalization as a citizen of the United States being sufficient to protect a subject of the Czar from punishment for offenses against the laws of the Empire committed before his emigration."

Mr. Wurts, chargé at St. Petersburg, to Mr. Bayard, Sec. of State, June 14, 1885, For. Rel. 1885, 603.

This dispatch related, primarily, to the case of Israel Müller, which was brought to the attention of the legation by Mr. Bayard's No. 21, May 25, 1885, For. Rel. 1885, 658. It was stated that Müller, who was a naturalized citizen of the United States of Russian origin, was, on his return to Russia in February, 1885, arrested and thrown into prison on a charge of having abandoned Russian allegiance without permission. He was released on bail and placed under police surveillance, but four weeks later escaped and returned to the United States. His case was not brought to the attention of the legation while he was detained in Russia.

Mr. Wurts referred to three other cases, the first of which was that of Rheinhardt Wagner. In 1883 it was reported that Wagner was exiled to Siberia, but, as stated by Mr. Wurts, it afterwards appeared that he had left Russia and was really in the United States. The second case was that of A. V. Perrin (*alias* Pravin), who in 1878 requested the legation to obtain permission for him to return to Russia for a few months. Mr. Stoughton, who was then American minister at St. Petersburg, informed him that if he came with an American passport and confined himself to legitimate business, he would not be disturbed, provided that he did not owe military service; but that, if he owed such service, he might be arrested, and that while the Russian Government in such cases usually, at the request of the American minister, granted a conditional release, this was regarded "as a concession from courtesy and not of right." In 1882, Mr. Perrin applied to Mr. Stoughton's successor, Mr. Hunt, who made a similar reply. Mr. Frelinghuysen approved Mr. Hunt's action and instructed him "to abstain from any further action in the case," adding that it was "regarded as taken out of the Department's control by the admission of Mr. Perrin that he is a Russian Jew owing military service." In 1884, when Mr. Taft succeeded Mr. Hunt at St. Petersburg, Mr. Perrin again addressed himself to the legation. Mr. Taft asked the Russian Government to grant him permission to pass six weeks in the Empire. The ministry of foreign affairs replied that there were no obstacles to his return, but added that it could not guarantee him impunity if his identity with Pravin, who owed mili-

tary service, should be established. The third case was that of Dr. J. Mordaunt Sigismund, who, while bearing an American passport, was arrested in Poland on a charge of emigration and evasion of military duty. He escaped, leaving his passport in the hands of the Russian police. Subsequently, when the legation asked for his passport, the Russian Government sent it to the legation, with the remark that it had been left by Dr. Sigismund with the police, but made no reference to his arrest.

As to Perrin's case, see Mr. Hoffman, chargé, to Mr. Blaine, Sec. of State, No. 170, Nov. 26, 1881, 36 MS. Desp. from Russia; Mr. J. C. B. Davis, Act. Sec. of State, to Mr. Hoffman, Dec. 29, 1881, MS. Inst. Russia, XVI. 256.

"The question brought up in the dispatch of Mr. Wurts—which may be commended for its clearness and for the valuable information it gives as to the practice in this relation of the legation at St. Petersburg—is whether Russia may, without a violation of international law, refuse to relieve Russians by birth who, after being naturalized in the United States, return to Russia, from the obligations imposed on them as Russian subjects.

"On this question it may be observed—

"(1) That we have no treaty with Russia in any way conceding on Russia's part the right of expatriation.

"(2) That even should we maintain that, by the present state of international law, the right to transfer allegiance by naturalization is generally established, this is subject to the right of the sovereign of original allegiance to disregard such naturalization when, so far as it concerns himself, it appears to have been illusory and insincere on the part of the party naturalized.

"It appears from the cases noted in Mr. Wurts's dispatch that the Russian Government, in the present case, has not transcended the right thus conceded of treating as inoperative foreign naturalizations which are thus illusory and insincere. The course, therefore, taken in the present case by the United States legation at St. Petersburg should meet with the approval of this Department."

Report of Dr. Francis Wharton, law officer of the Department of State, July 8, 1885, For. Rel. 1885, 669.

This report was transmitted to Mr. Lothrop, American minister at St. Petersburg, with an instruction signed by Mr. Porter, Acting Secretary of State, July 18, 1885. In this instruction the Department of State said: "While the Department approves Mr. Wurts's course in reporting the general aspects of the case before action, and concurs with his inference that a favorable reply from the Russian Government is not probable, yet it would be as well, on general principles, to state Müller's case in the most favorable light to the foreign office without demanding his release as a right, expressing the hope that there may be circumstances which would dispose the authorities to be lenient, as has occasionally happened in previous cases. It will thus be a matter of record that the Department and your legation

have used their best efforts for our citizens, and each additional case will add to the evidence of the necessity for a naturalization treaty when a favorable moment arrives." (For. Rel. 1885, 669.)

In so much of this instruction as relates to the question of Müller's release, the fact seems to have been overlooked that he had escaped from Russia, and was in the United States when he brought his case to the Department's notice. (For. Rel. 1885, 658.)

See, further, as to the question of expatriation, Mr. Lothrop, min. to Russia, to Mr. Bayard, Sec. of State, No. 9, Aug. 13, 1885, For. Rel. 1885, 671.

"While the Department will give you a passport on your furnishing proof of your naturalization, it is nevertheless proper to say that, if you were born, as appears, a Russian subject, no encouragement can be given you to extend your proposed journey as far as the territory of your native country. Notwithstanding the overtures of the United States, the Government of Russia has not signed any treaty of naturalization with this Government; and any former subject, who had left Russia without the permission of the Emperor, might be held or at least arrested on a charge of unfulfilled obligations to that Government, should he venture within its jurisdiction."

Mr. Bayard, Sec. of State, to Mr. Grant, June 1, 1886, 160 MS. Dom. Let. 363.

See, in the same sense, Mr. Bayard, Sec. of State, to Mr. Bahny, July 15, 1886, 161 MS. Dom. Let. 2; Mr. Bayard, Sec. of State, to Mr. Weinstein, April 7, 1887, 163 MS. Dom. Let. 568; Mr. Rives, Asst. Sec. of State, to Mr. Fisher, March 31, 1888, 167 MS. Dom. Let. 630.

Mr. Bayard, in a letter to Mr. Byrne, Sept. 24, 1886, uses the form of reply employed in Mr. Evarts to Mr. Cronstine, March 17, 1880, *supra*, p. 624.

Dec. 27, 1888, the Department of State inquired of the Russian legation whether it could furnish a safe conduct to enable a native of Russian Poland, Mr. Adolph Kutner, who had emigrated thirty-five years before and had been naturalized in the United States, to revisit his native country unmolested. The legation replied that it had no power to issue such a safe conduct, but that it was open to Mr. Kutner to petition the minister of the interior. The subject was then brought unofficially to the attention of the Russian authorities through the American legation at St. Petersburg. (Mr. Bayard, Sec. of State, to Mr. Tree, min. to Russia, Jan. 2, 1889, MS. Inst. Russia, XVI. 574.) The Russian Government asked that Mr. Kutner should answer certain interrogatories concerning his life and career, including one as to the religion professed by him. The Department of State, in conveying this communication to him, "found itself unable to interrogate him as to the religion professed by him, inasmuch as the Constitution of the United States prohibits the application of any religious test whatever in respect of citizens of the United States." (Mr. Blaine, Sec. of State, to Mr. Wurts, *chargé*, Jan. 10, 1890, MS. Inst. Russia, XVI. 622.)

Some years later the Russian *chargé d'affaires* refused to authorize the visé of Mr. Kutner's passport, because he "was not a Christian." The case was the subject of a resolution in the Senate, May 25, 1897.

(Mr. Sherman, Sec. of State, to Mr. Breckinridge, min. to Russia, June 18, 1897, MS. Inst. Russia, XVII.; Senate Com. on For. Rel. to Sec. of State, May 27, 1897, MS. Misc. Let., May, 1897, part 3; and Sec. of State to Com. on For. Rel., June 5, 1897, 19 MS. Report Book, 508.)

"Your dispatch No. 92, of January 18, 1887, relative to the case of Adolph Lipszyc, has been received. In it you state that 'Lipszyc is not charged with any violation of the Russian laws before leaving the country or since his return. His sole offense is his naturalization in the United States without the consent of Russia, of which he was a subject.'

"By the law of July 27, 1868 (Rev. Stats., s. 1999), it has been enacted that—

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in recognition of this principle, this Government has freely received emigrants from all nations and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

"This right, therefore, it is the duty of the Department and its representatives abroad to maintain without restrictions or qualifications.

"At the same time the Department is far from questioning the right of His Imperial Majesty to refuse to permit his subjects to emigrate. This is an incident of territorial sovereignty recognized by the law of nations, but can only be exercised within the territory of Russia. If a Russian subject emigrates and becomes a citizen of the United States, his acquisition of this citizenship entitles him to all the privileges which by treaty, or the law of nations, belongs to citizens of the United States when visiting Russia. Doubtless he could, when thus revisiting Russia, be tried, as a general rule, for offenses committed by him before emigration.

"But this general rule does not include the offense of expatriation when followed by the acquisition of citizenship in the United States. This position is maintainable under the law of nations, but the case falls within the tenth article of the treaty of 1832, between Russia and the United States, a copy of which is inclosed.

"The article distinctly provides that Russian subjects in the United States and American citizens in Russia, without any distinction as to native or naturalized citizens or subjects, may dispose



of their property. That a citizen of the United States naturalized in Russia could under the treaty dispose of his property in the United States is beyond question, and the privileges thus conferred are equally given and equivalent, and should be so construed by each of the contracting parties. As citizens of the United States becoming Russian subjects are not to lose their property in the United States, so Russian subjects becoming citizens of the United States are not to lose their property in Russia.

“It may be said that this stipulation is qualified by the concluding sentence of the article, providing that it is not to derogate ‘from the force of the laws already published, or which may hereafter be published, by His Majesty the Emperor of all the Russias to prevent the emigration of his subjects.’

“It is not necessary to do more than call your attention to the rule that the assertion at the close of a treaty, of a general claim to which a prior grant is an exception, is an affirmation of such a grant. Of this the reassertion of their general claims to sovereignty by the German emperors in their treaties with other sovereigns may be taken as an illustration; and another, to the same effect, may be found in our negotiations with Great Britain, in which she recognized Britons naturalized in the United States to be American citizens, while maintaining the doctrine of perpetual allegiance. But such reservation does not conflict with the prior grant. When the *status* of citizenship is changed, then the right of control ceases.

“His Imperial Majesty may ‘prevent’ Russians from coming to the United States, but when they have come, and have acquired American citizenship, they are entitled to the privileges conferred by the article.

“If there could be any doubt that this is the true meaning of the article in question it would be removed by the fact that it is adopted from the fourteenth article of the treaty between the United States and Prussia, concluded May 1, 1828.

“That treaty was accepted by Mr. Buchanan and Count Nesselrode, the negotiators, as a standard; and the Russian treaty is to be taken with the construction which the Prussian treaty rightfully bears. A copy of this treaty between the United States and Prussia is inclosed herewith.

“It was never contended by Prussia, nor subsequently by Germany, that the validity of the naturalization of a Prussian or German in the United States was under this article to be conditioned upon his having emigrated with his sovereign’s consent. If such an emigrant left his native land in violation of its laws requiring him to perform military service, this might be the subject of prosecution on his return. But emigration, by itself, when followed by the acquisition of citizen-

ship in the United States, was not to deprive such citizen of the unmolested enjoyment of the rights of American citizenship as given by international law as well as by the treaty in question. The object of the treaty was to secure to that large class of Prussians who had emigrated, and had become citizens of the United States, the right to dispose of their property in their native land, with a mutual and equivalent privilege to emigrants from the United States, who should become Prussian subjects. The question whether the emigration was with the consent of the sovereign was not made, nor could such a condition have been accepted without destroying the newly-acquired rights of citizenship.

"The construction always given to the Prussian treaty by both the parties thereto has been that the rights it gives Prussians (or Germans) who become citizens of the United States are not dependent on their emigration being with their sovereign's consent. German sovereigns have not been disposed to look favorably on those of their former subjects who, having emigrated and been naturalized in the United States, revisit their native land to dispose of their property. But numerous as have been such visits, in no single case has there been an attempt to proceed against such visitors for breach of allegiance. Count Nesselrode and Mr. Buchanan must have been well aware of this; and it is impossible for us to do otherwise than hold that when they adopted in 1832 the very words of the treaty of 1828 they adopted them with the construction which they not only naturally bear, but which had been assigned to them in practice both by Germany and the United States.

"We must, under the treaty before us, regard Lipszyc's United States citizenship as having been acquired with the assent of Russia; and, therefore, he is entitled under treaty, not merely in this country but in Russia, to the immunities attached to such citizenship. As a citizen of the United States he visits Russia; and although he may be liable, when in Russia, for offenses committed by him before his emigration, and may be expelled from Russia on reasonable grounds, he can not be tried for an emigration which, when followed by naturalization in the United States, Russia herself recognizes as conferring citizenship of the United States with the right of disposition in Russia of property there situated. And when you invite from His Imperial Majesty's Government the withdrawal of penal action based exclusively on that emigration you ask for no act which is at variance with the policy of that Government, but for one that is simply in accordance with its treaty stipulations. The withdrawal of such prosecution would be regarded as a signal proof of the continuance of the friendship which has so long existed between Russia and the United States.

"Such a withdrawal is [in] no way inconsistent with the acknowledged right of Russia to prevent emigration; but on the other hand for the United States to acquiesce in the deprivation of the rights which belong to their naturalized citizens, would be to surrender one of their cherished and fundamental institutions. To such surrender this Department can not assent. And in view of the eminently friendly relations between the two Governments and of the facts that the question is not, under the treaty, one of principle with Russia; and that Lipszyc has been already subjected to a long imprisonment, I am confident His Imperial Majesty's Government will not hesitate to act in accordance with the opinions and wishes of the United States. Releasing Lipszyc from imprisonment in no way derogates from the rights of Russia as reserved in the treaty, and I am sure His Imperial Majesty's Government will be unwilling, by continuing that imprisonment, to press on the United States so unwelcome a question as that of the inviolability of the treaty privileges of her citizens."

Mr. Bayard, Sec. of State, to Mr. Lothrop, min. to Russia, Feb. 18, 1887, For. Rel. 1887, 948.

Article 325, Russian Penal Code, chap. 7, reads as follows: "Whoever, leaving his country, enters a foreign service without the permission of the Government, or takes the oath of allegiance to a foreign power, for this transgression of the duty of a loyal subject and of his oath is liable to the loss of all social rights and perpetual banishment from the territory of the Empire, or, in case of his unauthorized return to Russia, to deportation to and settlement in Siberia." (For. Rel. 1887, 945.)

*Article X. of the treaty of 1832 with Russia.*

The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representatives, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate, within the territories of one of the high contracting parties, such real estate would by the laws of the land descend on a citizen subject of the other party, who by reason of

alienage may be incapable of holding it, he shall be allowed the time fixed by the laws of the country; and in case the laws of the country actually in force may not have fixed any such time, he shall then be allowed a reasonable time to sell such real estate, and to withdraw and export the proceeds without molestation, and without paying to the profit of the respective Governments any other dues than those to which the inhabitants of the country wherein said real estate is situated shall be subject to pay in like cases. But this article shall not derogate in any manner from the force of the laws already published, or which may hereafter be published, by His Majesty the Emperor of all the Russias, to prevent the emigration of his subjects.

*Article XIV. of the treaty of 1828 with Prussia.*

The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representative, such care shall be taken of the said goods as would be taken of the goods of a native, in like case, until the lawful owner may take measures for receiving them. And if question should arise among several claimants to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exempt from all duties of detraction, on the part of the Government of the respective States. But this article shall not derogate in any manner from the force of the laws already published, or hereafter to be published by His Majesty the King of Prussia, to prevent the emigration of his subjects.

“By your note dated March 27–April 8, you informed me that the Government of the United States considered the arrest and trial of Mr. Adolph Lipszyc, prosecuted for having become a naturalized American citizen; as a grievance of which it felt called upon to complain.

“You made also the observation that the documents of Lipszyc, having been legally delivered to him and constituting private property, of which he had made no criminal use, the Government of the United States could not admit that he might be deprived of them or hindered from making use of them.

“I shall permit myself to remark to you on this subject, Mr. Minister, that the whole question appears to rest on a misunderstanding,

which has prevented the acts of the Imperial Government from receiving a correct interpretation on your part.

"The relations of the state to the subject or citizen are the exclusive domain of the internal legislation of every country, which alone has the right and the power of loosening or tightening the bonds that serve to hold its subjects or citizens according as it may judge fit or necessary for the public welfare in general.

"This right is thus understood and practiced by all governments. Thus it was only in 1868 that the United States proclaimed the freedom of emigration of their citizens; it was in 1870 that England for the first time abandoned the strict observance of the principle, 'once a subject, always a subject.'

"France does not now recognize the right of her citizens to emigrate except under certain conditions, and a Frenchman naturalized in a foreign country can eventually be prosecuted in France, and even condemned to death.

"The Imperial Government of Russia does not recognize the right of its citizens to emigrate without special authority. According to the terms of article 325 of the penal code any person who, having gone abroad, takes service there without the authority of Government, or who becomes naturalized, incurs the loss of all his civil rights and perpetual banishment. If he returns to Russia he would be transported to Siberia.

"This law is altogether general in its purport and is applicable without discrimination to Russian subjects who may have become naturalized in any country whatsoever. Its application to the case of Lipszyc can not, therefore, be regarded as a grievance towards the United States.

"In regard to Lipszyc's papers, it is necessary to form a just idea of the value they may have in Russia.

"That these papers were legally delivered by the American authorities there can be no subject for doubt. The Government of the United States grants naturalization on the request of any person domiciled in the States who fulfills the requirements of the American law on naturalization.

"It furnishes him with documents which, setting forth his capacity of citizen of the United States, guarantee to him its advantages. The act of naturalization being according to law the papers have a legal value in America.

"On the other hand, a fundamental law of the Empire forbids Russian subjects to change their nationality, and every infraction of this law is punished as a crime.

"A person inscribed on the registers of population as a Russian subject, unless especially authorized to emigrate, is and always remains a Russian subject, whether he wishes it or not. He could not hold

an authentic foreign passport without violation of the law. His papers, therefore, can have no legal value in Russia; they tend to prove his guilt without changing anything in his position as a Russian subject. While an American law has conferred upon him the rights of American citizenship, a Russian law considers him as having preserved the status of a Russian subject. There is a conflict then between the legislations of the two countries, but in the opinion of the Imperial Government without the possibility resulting therefrom of the least alteration of the good relations of the two Governments.

"The situation is altogether the same on both sides. As Russia could not pretend that a law of the Empire should hinder action of the laws in the United States, so the United States can not demand that a Russian law should be amended or abolished in its effects by reason of an American law. When a Russian subject becomes naturalized in America as a citizen, the Government of the United States ignores the Russian law, which forbids him the act, and which always holds him to be a Russian subject.

"If he returns to Russia he naturally falls back under the penalty of the Russian law, and the Imperial Government could not recognize in him the standing acquired contrary to the dispositions of its own laws.

"Nevertheless, on closer examination of the question, it is easy to perceive that the conflict above indicated between the Russian and the American legislations is but apparent, and can cause no real difficulty.

"In fact the Government of the United States confers naturalization on a foreign subject without inquiring into the laws of the country to which he belongs; but it only does so at the request of the foreigner.

"It is for him to know what he loses on quitting the citizenship of his own country, and to judge if the advantages which he counts on by his change will sufficiently compensate him for his losses. A Russian naturalized in the United States knows, or ought to know, that he can not return to Russia without danger of criminal punishment. If he returns, all the same, it is at his risk and peril.

"The complaint of the United States in this case appears all the less founded, as by one of the provisions of the treaty of 1832 the difference between an American citizen, formerly a Russian subject, and every other citizen of the United States has already been clearly established. Article 10 of that treaty, in determining the rights of the respective citizens or subjects in regard to inheritance, stipulates at the same time that 'this article shall not derogate in any manner from the force of the laws already published or which may hereafter be published by His Majesty the Emperor of all the Russias to prevent the emigration of his subjects.'

"In bringing the foregoing to your notice, Mr. Minister, I venture to indulge the hope that you will admit that in the case of Lipszyc the Imperial Government has but conformed to the formal provisions of the laws of the Empire, and has in no manner derogated from the principles of equity and of law which should exist in the amicable relations between Russia and the United States."

M. de Giers, Russian min. of for. aff., to Mr. Lothrop, Am. min., April 11-23, 1887, For. Rel. 1887, 959-961.

As to proposed changes in the Russian law concerning naturalization, see Mr. Lothrop to Mr. Bayard, March 17, 1887, and Mr. Heenan, consul at Odessa, to Mr. Porter, Assist. Sec. of State, March 29, 1887, For. Rel. 1887, 955, 957; Mr. Lothrop to Mr. Bayard, No. 119, June 1, 1887, 39 MS. Desp. from Russia; Mr. Bayard to Mr. Lothrop, No. 93, June 24, 1887, MS. Inst. Russia, XVI. 516.

"It is not hopefully anticipated that Russia will be now disposed to enter upon a negotiation so often refused, but you are at liberty to sound the minister of state on the subject." (Mr. Bayard, Sec. of State, to Mr. Lothrop, min. to Russia, Jan. 14, 1886, MS. Inst. Russia, XVI. 465.)

"I duly received your note of April 11-23 in answer to mine of March 27-April 8. I beg to express to your excellency my high appreciation of the considerate attention you have given to the case of Adolph Lipszyc, and for your courteous statement of the views of the Imperial Government relative to his naturalization in the United States.

"In submitting to you some further observations which seem to me pertinent, I should say at the outset that, as I understand it, to a certain extent my Government is in cordial agreement with you.

"The United States fully assents to the doctrine that to every country belongs the exclusive management of its domestic affairs. No political principle is held more sacred than this in America. It also agrees that all who enter a country become subject to the laws and tribunals of that country for all acts done while remaining there. It also agrees that to every country belongs the exclusive right to prescribe and enforce its relations with its own subjects or citizens. So long as a man remains in the land of his birth he certainly owes it allegiance and must recognize the obligations and duties imposed by its laws. This allegiance of course continues until rightfully transferred to and accepted by another government.

"Here the divergence obviously begins. The United States insists that it is neither just nor practical, especially under the conditions of modern society, to assume that native allegiance is a perpetual bond which can not be renounced.

"The position of the United States is that when a man has actually expatriated himself, and by naturalization has assumed allegiance to an adopted country, his political situation is completely changed.

Citizenship is a personal condition and attends an individual wherever he goes. From the nature of the case he can not owe a twofold allegiance. He can not at one and the same time be one thing at Athens and another at Rome, but must bear the same national character everywhere. Naturalization of course implies the renunciation of the former allegiance and the assumption of a new allegiance. This act therefore necessarily affects his relations to two governments, and what was before limited to questions of purely domestic concern may thus be raised to international importance. It seems to me, with great deference, that it obviously presents something more than the ordinary case of a 'conflict of laws,' spoken of by your excellency. Such conflicts usually concern only private and individual rights. A conflict between states as to citizenship involves a conflict as to allegiance, which is, of course, of the highest public concern.

"In ordinary cases of conflict of laws it is readily recognized that each country, within its own territorial jurisdiction, may administer its own laws without any just ground of offense to any other. But when a conflict as to the right of naturalization arises, the question of private rights is almost necessarily merged in the paramount question of the rights of the state.

"It seems to me that it is only by great discretion that conflict on so delicate a subject can fail to endanger harmonious relations. It gives me great pleasure here to say, that the judicious consideration extended by the Imperial Government in cases of this kind has hitherto happily averted unpleasant feelings.

"In a previous letter I have pointed out that the views of the United States are not at all of a theoretical or sentimental character. They are of the most practical and vital character, for a very large portion of its best citizens hold their citizenship by naturalization.

"It would be quite irrelevant for me to discuss here the origin or extent of the doctrine of indelible allegiance. But it seems proper to notice that your excellency seems to have been led into an error as to the position of the question in the United States. It is true that it was only in 1868 that the natural right of expatriation was declared formally by act of Congress, but this was never intended or understood as the declaration of a new principle. It was only intended as a solemn declaration of a fundamental principle. I can declare, on the highest authority, that no other doctrine has ever been held, from the foundation of the Government, by any of its political departments, and this is a question which pertains especially to the political departments of the Government. It was one of the questions which led to our war of 1812 with Great Britain, and though it remained unsettled at the close of that war, yet it was not thereafter asserted with the former arrogance. So much doubt, indeed, was thrown on



the question that, finally, in 1868, it was referred to a commission of England's most eminent jurists and statesmen, who unanimously reported that the doctrine 'once a subject, always a subject,' was 'neither reasonable nor convenient,' and that it 'was at variance with those principles on which the rights and duties of a subject should be deemed to rest.' Under this decisive condemnation the doctrine, as your excellency is aware, disappeared from British law.

"As to the laws of France on this important subject, though aware of some obscurity about it, I have not understood it quite as stated by your excellency. The Code Napoleon expressly declared French citizenship to be lost by foreign naturalization. I am informed that by some subsequent laws, Frenchmen acquiring foreign naturalization without leave were subjected to the penalty of confiscation of property and to deportation from the Kingdom. In 1860, however, in his annual message, President Buchanan was able to declare, on the authority of the French minister of war and the decisions of the French courts, that France recognized the right of expatriation. But in the disturbed period about 1870, it seems that some law or regulation was adopted, that where a person conscripted failed to appear, he might be prosecuted for 'insoumission.' If it appeared that he had been naturalized abroad for three years or more, he was discharged; if for a less time, he might be imprisoned for a short period. I am not aware that even this modified regulation has been enforced of late years.

"I also note your protest that the treaty of 1832 does not recognize the lawfulness of the naturalization of Russian subjects by the United States.

"Without further discussing the point at this time, I should state that my Government has supposed it did so recognize such naturalization; and I may add that it seems to me that the emigration clause, at the end of the 10th article, may be given full force without ascribing to it the meaning given in your note. Certainly the United States never for a moment questioned that the right to regulate and control the emigration of its subjects was within the exclusive domain of the Imperial Government. This it regards as an incident of territorial sovereignty to be exercised within territorial limits, but not as following the subject into foreign countries.

"I regret that I can not assent to your excellency's position that Lipszyc's naturalization papers, though valid in America, are valueless in Russia. They are valid in America only because they recognize a valid national act, and in the hands of a naturalized citizen they are the peaceful evidence of his citizenship. If the Imperial Government claims that the act of naturalization violates its rights, it might properly demand of the United States that the papers should

be revoked and withdrawn. But to seize and confiscate such papers, when no unlawful use has been made of them, seems to be wholly unnecessary and to be an exercise of power of which the United States may justly complain.

"In taking leave of the legal aspects of this case, as they present themselves to me on principles alike just and convenient, I beg for a moment to ask whether the following may not justify your indulgent consideration. It is now over twenty-five years since Lipszyc left Russia and he has ever since lived in the United States. Even if he is guilty of an offense in acquiring naturalization may it not now, after this lapse of time, be condoned?

"I am also informed that the Emperor on his accession to the throne, or at his coronation, graciously made a grant of amnesty or pardon which would include the offence charged against Lipszyc.

"I have never seen a copy of this imperial act, and my information may be incorrect, but I beg respectfully to call attention to it. At the same time permit me to say that I should be greatly obliged if your excellency could furnish me an English or French translation of his Majesty's grant aforesaid."

Mr. Lothrop, min. to Russia, to M. de Giers, min. of for. aff., April 24—May 6, 1887, For. Rel. 1887, 961.

Mr. Lothrop, in reporting the result of the trial of Lipszyc, or Leibschutz, said: "Leibschutz has been tried and found guilty and sentenced to be sent out of the empire. . . . I presume, as is usual, the deprivation of civil rights is a part of the sentence. If so, this probably works a forfeiture of his interest in his father's estate." The Department of State "was not at that time in a position to deny the right of Russia to take the action which was taken in this case, and it does not now, in the absence of a treaty by which the Russian Government recognizes the right of expatriation, deem that it would be warranted in further intervening in Mr. Leibschutz's behalf." (Mr. Adee, Act. Sec. of State, to Mr. Widdicombe, Oct. 13, 1893, 194 MS. Dom. Let. 5.)

Subsequently, the American minister at St. Petersburg used his good offices in support of a petition addressed by Leibschutz, or Lipszyc, to the Emperor for a pardon. (Mr. Olney, Sec. of State, to Mr. Breckinridge, March 11, 1896, MS. Inst. Russia, XVII. 429.)

"Our legation at St. Petersburg reports that the refusal of the Russian consular officers in this country to authenticate the papers of the Messrs. Lima is based on the law depriving all Russian subjects, who without permission emigrate and assume a foreign nationality, of their civil rights, thus rendering them incapable of owning or inheriting any property in the Empire, or of doing there any legal act whatsoever; so that the power of attorney of the Messrs. Lima, even if duly authenticated, would not be admitted in the courts. The only appeal is by petition to the Emperor. This may be written in English, should state the circumstances of the case respectfully, clearly, and succinctly, should give the address of the petitioner, should be addressed 'To His Imperial Majesty Alexander III, Emperor of All

the Russias, St. Petersburg, Russia,' and should be sent by mail, and not through this Department nor our legation at St. Petersburg. The effect of the law may also be avoided by an arrangement with the co-heirs in Russia, under which the latter accept the inheritance and allow the heirs in this country such proportion as may be agreed upon, although of course there is no method of enforcing such an agreement." (Mr. Moore, Acting Sec. of State, to Mr. Harmer, Aug. 10, 1889, 174 MS. Dom. Let. 111.)

"With reference to your letter of the 3d instant, enclosing two documents for authentication by the Russian legation, I have to inform you that the papers have been returned to this Department by the Russian chargé d'affaires ad interim, with the statement that the legation 'cannot authenticate any documents whatever, relating to the transfer of property in Russian Poland issuing from Hebrews who have left Russia without permission.' The chargé consequently declines to legalize the papers unless accompanied by passports or other documentary evidence, showing that the parties left Russia with the permission of the Imperial Government. Your papers are accordingly herewith returned to you."

Mr. Bayard, Sec. of State, to Mr. Lavenberg, Oct. 7, 1887, 165 MS. Dom. Let. 538.

As to the case of Mr. Adolph Kutner, the following documents are printed in H. Ex. Doc. 470, 51 Cong. 1 sess.: Mr. Bayard to Baron Rosen, Dec. 27, 1888, p. 89; Mr. H. S. Foote to Mr. Morrow, M. C., Dec. 11, 1888, p. 90; Baron Rosen to Mr. Bayard, Dec. 16, 1888, p. 90; Mr. Bayard to Mr. Tree, No. 5, Jan. 2, 1889, p. 90; Mr. Muldrow to Mr. Bayard, Dec. 3, 1888, p. 91; Mr. Blaine to Mr. Muldrow, Dec. 7, 1888, p. 92; Mr. Muldrow to Mr. Bayard, Dec. 27, 1888, p. 92; Mr. Tree to Mr. Bayard, No. 13, Feb. 1, 1889, p. 94; Mr. Blaine to Mr. Wurts, April 20, 1889, p. 112; Mr. Blaine to Mr. Foote, April 20, 1889, p. 113; Mr. Adee to Mr. Foote, Sept. 19, 1889, p. 118; Mr. Wurts to Mr. Adee, No. 58, Oct. 8, 1889, p. 123; Mr. Wurts to Mr. Blaine, No. 68, Nov. 7, 1889, p. 124; Mr. Wurts to Mr. Blaine, No. 70, Dec. 7, 1889, p. 124; Mr. Blaine to Mr. Wurts, No. 73, Jan. 10, 1890, p. 125.

As to the case of Herman Kempinski, see, in the same document, the following: Mr. Powdermaker to Mr. Blaine, March 11, 1889, p. 94; Mr. Wurts to Mr. Blaine, No. 18, March 15, 1889, p. 108; Mr. Blaine to Mr. Wurts, tel. March 16, 1889, p. 110; Mr. Wurts to Mr. Blaine, No. 19, March 18, 1889, p. 111; Mr. Wurts to Mr. Blaine, tel. May 12, 1889, p. 114; Mr. Wurts to Mr. Blaine, No. 34, May 12, 1889, p. 114; Mr. Adee to Mr. Wurts, No. 51, Sept. 20, 1889, p. 118.

In August, 1892, it was reported that Jacob Goldstein, a naturalized citizen of the United States, bearing a passport issued by the Department of State, had been arrested and imprisoned at Kharkov, Russia, on the ground that he was "amenable to militia duties." The legation of the United States at St. Petersburg was instructed to investigate the case. The legation, while referring to the case of

Kempinski in 1889, and suggesting that, if Goldstein had been arrested for evasion of military service, the penalty for which is exile to Siberia, his best course would be to prepare a petition for clemency, presented the case to the Russian foreign office, and ascertained that Goldstein was in reality charged with being a person named Zlotow and with having entered Russia under a false passport. Goldstein was brought before the local court at Kharkov, which decided in his favor. He left immediately afterwards, and the case was thus disposed of.

For. Rel. 1893, 526, 527-528, 541, 543.

It was stated that William Schwabauer, a native of Russia, emigrated to the United States in 1876, bringing with him a son three months old; that he was naturalized in 1882, and in 1890 went to Russia, taking his family with him; that, after a visit of two months, he returned to the United States, but left his son behind on account of illness, and that the son was afterwards prevented by the Russian authorities from leaving the country. The son, according to the laws of the United States, was an American citizen through the naturalization of his father, but by Russian law was considered a Russian subject, in spite of his father's naturalization. "While the position of the Russian Government is opposed to American ideas, this Government cannot, in the absence of treaty stipulations controlling the subject, do more than use its good offices in endeavoring to secure the permission of the Russian Government for the return of your son."

Mr. Gresham, Sec. of State, to Mr. Schwabauer, Oct. 18, 1893, 194 MS. Dom. Let. 50. See, also, Mr. Gresham, Sec. of State, to Mr. White, min. to Russia, Oct. 18, 1893, MS. Inst. Russia, XVII. 188.

"Our legation at St. Petersburg has been informed that, under Russian law, such petition [for permission for the wife and son of a naturalized citizen of Russian origin to join him in America] must be signed by the interested parties and addressed directly to the Russian minister of the interior, if it is a question of a change of nationality, or to the governor of the proper province, if it is a question of obtaining a passport to go abroad." (Mr. Adey, Act. Sec. of State, to Mr. Elmore, Aug. 30, 1895, 204 MS. Dom. Let. 300.)

Samuel B. Rosenthal, a native of Russia, who came to the United States when fourteen years of age and was afterwards duly naturalized, was notified by the Russian authorities that he was required to perform military service; and his father, who still lived in Russia, was ordered to produce him by a certain day, subject to a penalty of 300 rubles for failing to do so. "As Mr. Rosenthal is not in Russian jurisdiction, but is in the United States, it is not perceived that there is occasion for any action by this Department in this case. It would not be proper, of course, for the Department to make any representa-

tions regarding the threatened imposition of a fine upon Mr. Rosenthal's father in Russia."

Mr. Uhl, Act. Sec. of State, to Mr. Cook, Nov. 20, 1893, 194 MS. Dom. Let. 313.

A fortiori no steps can be taken by the Department to prevent the collection in Russia of such a fine imposed upon the parents of a person who has only made a declaration of intention to become a citizen of the United States. (Mr. Bayard, Sec. of State, to Mr. Weinstein, April 7, 1887, 163 MS. Dom. Let. 568.)

Miss Cecilia C. Gaertner, a naturalized citizen of the United States, of Russian origin, who left her native land at the age of fifteen without permission of the Russian Government, inquired of the Department of State whether she could return to Russia without fear of molestation. The Department suggested that the most discreet course for her to pursue would be to address a formal petition directly to the proper authority for release from Russian subjection. She adopted this course, and the American minister at St. Petersburg was instructed to use his personal good offices to obtain early and favorable consideration for the petition. The petition was granted.

Mr. Gresham, Sec. of State, to Mr. White, min. to Russia, Feb. 10, 1894, MS. Inst. Russia, XVII. 205; Mr. Uhl, Act. Sec. of State, to Miss Gaertner, Jan. 29, 1895, 200 MS. Dom. Let. 404, enclosing a note from the Russian foreign office of Jan. 11, 1895, announcing that the Emperor had granted her petition for permission to throw off her Russian allegiance. The note of the foreign office accompanied dispatch No. 27, Jan. 14, 1895, 46 MS. Desp. from Russia.

It was reported in 1894 that Stanislaus Krzeminski, a naturalized citizen of the United States, had been exiled to Siberia for expatriating himself without permission. Mr. Gresham, as Secretary of State, in an instruction to Mr. White, American minister at St. Petersburg, July 3, 1894, said that, if the report were true, Krzeminski's "exile to Siberia, for no reason save his having quitted his native country some thirty years ago without imperial consent, would entail a hardship calling for earnest remonstrance." Mr. White wrote to the foreign office, and also visited it, urging the earliest and most favorable attention possible to the subject. There being delay, he applied to the minister of the interior for information and learned, informally, that, although Krzeminski had committed an offence in leaving the empire without permission, he had been relieved from all penalties for it by an imperial amnesty, but that he was detained on a charge of defalcation as a police official before he left the empire, and that further application regarding the case would best be made to the ministry of justice. Mr. White afterwards called at that ministry, and, besides, had two interviews with the acting minister of foreign

affairs, with whom he left "a personal note." Krzeminski subsequently died in prison at Warsaw.

For. Rel. 1894, 541-557.

In a dispatch, No. 267, of September 29, 1894, Mr. White, referring to his interviews with the Russian officials, said:

"While personally very civil, they seem to regard it as incompatible with their national dignity to give any account to another power regarding any person whom they look upon as a Russian subject or as a violator of Russian law. This position here taken is so fully recognized by other powers that even Great Britain, which has the reputation of protecting her subjects with the utmost care in all parts of the world, never interferes in behalf of one of its naturalized subjects who returns to the country of his origin. In any other country she claims the right to protect him to the extent of her power, but if he revisits the land of his birth, from which he has separated himself by a formal act, he does this at his own risk and peril, and the representative of the British Government absolutely refuses to consider the case. I hope that my successor may reap some advantage from my efforts in this case, but I can not say that I expect it." (For. Rel. 1894, 545.)

"But few cases of interference with naturalized citizens returning to Russia have been reported during the current year. One Krzeminski was arrested last summer in a Polish province, on a reported charge of unpermitted renunciation of Russian allegiance, but it transpired that the proceedings originated in alleged malfeasance committed by Krzeminski while an Imperial official a number of years ago. Efforts for his release, which promised to be successful, were in progress when his death was reported." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, xiii.)

See Mr. Gresham, Sec. of State, to Mr. Dasler, Aug. 29, 1894, 198 MS. Dom. Let. 423; Mr. Gresham, Sec. of State, to Mr. Jansen, April 13, 1895, 201 MS. Dom. Let. 494; to Mr. Studebaker, June 5, 1893, 192 *id.* 244; to Mr. Izer, July 17, 1893, *id.* 615.

"There is no naturalization treaty between the United States and Russia, and it is understood that the laws of that Empire forbid a subject to emigrate or to become naturalized in a foreign country without the permission of the Emperor, or to throw off his allegiance until he has performed military service, under penalty of fine or exile. Should you return to Russia you will place yourself within the jurisdiction of these laws, and while, if you should be arrested on a charge of infraction of some of the above-mentioned laws, the legation of the United States at St. Petersburg would, on receiving proof of your American citizenship, intervene in your behalf, the success of that intervention can not be foreseen.

"The entrance of alien Jews into the Empire is also forbidden, as is also the visa of their passports by Russian consular officers."

Mr. Olney, Sec. of State, to Mr. Kassell, June 22, 1895, 203 MS. Dom. Let. 39; Mr. Olney, Sec. of State, to Mr. Toroski, June 21, 1895, *id.* 23.

As to the passport of application of Simon Behrman, see Mr. Olney, Sec. of State, to Peirce, chargé, Feb. 13, 1897, MS. Inst. Russia, XVII, 546.

"The position taken by the Imperial Government in Yablkowski's case, accompanied as it is by the text of the Russian law claimed to be applicable to such cases, constitutes the most direct statement of the Russian contention in this regard that has as yet been presented.

"Taking the two clauses of the law together, they amount to a claim for the punishment of a Russian subject for the imputed offense of becoming a citizen or subject of another state, or even of entering into the service of another state. Unlike the legislation of some other countries, the Russian law does not decree loss of citizenship by the fact of embracing any other allegiance, and the deprivation of civil rights and perpetual banishment from the territory of the Empire, coupled with deportation to Siberia in the event of the individual's return to Russia, are only consistent with the assertion of continuing Russian subjection and with a claim to punish him as a subject.

"The position of the United States as to the right of expatriation is long established and well known. The doctrine announced by us at an early stage of our national existence has been since generally adopted by all the European states except Russia and Turkey; and the Turkish Government does not go so far as to assert in practice a claim to punish a Turk for the offense of acquiring any other nationality. That every sovereign state has an indefeasible right to prescribe and apply the conditions under which an alien, being within its territorial jurisdiction, may be admitted to citizenship is a proposition not to be denied and scarcely capable of any material qualification. The legislation of the United States proceeds upon this theory.

"Under the circumstances, and under the statutes of this country, this Government can not acquiesce in the Russian contention now formally announced, and must continue in the future to do as it has done in the past, and remonstrate against denial of the rights of American citizenship to persons of Russian origin who by due process of law have acquired our nationality, controverting any and every attempt to treat the acquisition of our citizenship as a penal offense against the law of the country of origin.

"It is deeply to be regretted that no treaty of naturalization exists between the United States and Russia similar to those concluded with other states of Europe which for many years held to the doctrine of perpetual allegiance as strongly as the Imperial Government now seems disposed to do. Whatever be the abstract rights of the matter contended for by the respective parties, some form of conventional agreement in reconciliation of their conflicting claims is alike desir-

able and honorable. Overtures in this sense have been made at times heretofore without immediate result, but it is earnestly hoped that at no distant time the two countries may be able to come to a mutually beneficial understanding in this respect, which, while subserving their several interests, will remove a notable cause of difference between them in a manner befitting their traditional friendship."

Mr. Olney, Sec. of State, to Mr. Peirce, *chargé d'affaires ad int.* at St. Petersburg, Nov. 4, 1895, *For. Rel.* 1895, II, 1107.

Anton Yablkowski, a naturalized citizen of the United States, of Russian origin, was arrested and imprisoned at Nieszawa, Russian Poland, in 1895. When arrested he bore a United States passport, which had been viséed by the Russian consul at Danzig, Prussia. In response to an inquiry from the United States legation at St. Petersburg, Mr. Chichkine, speaking for the ministry of foreign affairs, stated, in a note of Sept. 22/Oct. 4, 1895, that a judicial proceeding had been begun against Yablkowski under article 325 of the Penal Code, for having become "a naturalized foreign subject without previous permission of his Government;" and with a later note, Oct. 3/15, Mr. Chichkine communicated to the legation the text and a French translation of article 325, which reads:

"Whoever absents himself from his fatherland and enters foreign service without the permission of the Government, or becomes subject of a foreign power, is condemned for such violation of duty and oath of faithful subjection to the privation of all civil rights and to perpetual banishment from the territory of the Empire, or, in case of voluntary return to Russia, to deportation to Siberia." (*For. Rel.* 1895, II, 1099, 1104, 1105.)

Another translation, sent by Mr. Rawicz, United States consul at Warsaw, reads:

"Whoever, after leaving this country, shall enter into the military service in another country without the permission of this Government, or shall become a citizen of another country, will, for breaking his allegiance and oath, be punished by the loss of all the rights of the state and the expulsion from the country forever, and in case he should return of his free will to Russia he shall be sent to Siberia to settle there forever." (*For. Rel.* 1895, II, 1111.) For another translation, in 1887, see *supra*, p. 636.

Mr. Peirce, in his first report of the case, Oct. 10, 1895, said: "In the absence of instructions, I felt it to be more prudent to make a protest against the continuance of these proceedings based simply upon the principles of international law as laid down by Vattel, Book II, Chapter VIII, sections 100 to 104, inclusive, and by other authorities. I hesitated to touch upon the stipulations of our treaty with Russia of 1832, Article X, far as this action seems to be from the spirit of that compact, lest it should be claimed that this case came within the limitations covered by the closing sentence of that article." (*For. Rel.* 1895, II, 1097.)

In a note to Mr. Chichkine, Sept. 28-Oct. 10, 1895, Mr. Peirce, referring to the visé of Yablkowski's passport by the Russian consul at Danzig, and also to the question of expatriation said: "I submit, therefore, that this man has been granted unconditional permission to enter the Empire as an American citizen by the official act of a duly quali-



fied officer of the Imperial Government, and that the continuance of proceedings against him, upon a criminal indictment, for the act of becoming a citizen of the United States, would hardly be in accordance with the laws of nations as defined by the most eminent authorities." (For. Rel. 1895, II. 1103.)

See, also, Mr. Peirce to Mr. Chichkine, Sept. 28-Oct. 10, 1895, For. Rel. 1895, II. 1102.

Mr. Chichkine, Oct. 3/15, 1895, replied: "It is precisely the character of legality which fails in the action of which Yablkowski is accused. The action imputed to Yablkowski would form an infraction of article 325 of the penal code. . . . Our consul-general at Danzig could not in any possible way know the antecedents of the man Yablkowski, and did not have a plausible excuse to refuse to visé his passport, and this can not consequently prevent justice from following its course." (For. Rel. 1895, II. 1104-1105.)

Mr. Peirce reaffirmed his position in a note to Mr. Chichkine, Oct. 4/16, 1895, For. Rel. 1895, II. 1105.

With reference to this note, Prince Lobanow, writing to Mr. Breckinridge, United States minister, Oct. 28-Nov. 9, 1895, said:

"I regret that I am not able to share your manner of seeing [the matter], inasmuch as it concerns a crime committed against Russian law by an individual who had not been released from his liens of subjection at the time he embraced another nationality. He formally violated this law by not seeking the permission of his Government.

"If the administrative authorities of the Empire had been acquainted with this fact during the time Mr. Yablkowski was abroad he would have been, according to law, condemned by default to perpetual banishment. But whereas, in this case, the Russian law would only have attained him in fact and in right in this manner, it had to apply another more rigorous disposition once he returned to his original country and the infraction was proved.

"Having delivered himself to the Russian law for crime committed against it, which he should not have been ignorant of, the Russian authorities legitimately arrested him, and he could not escape the proceedings to which he was liable.

"With regard to the visé affixed by the Russian consular authority on the passport in the possession of Mr. Yablkowski, it does not change the question in any manner whatever." . . .

Prince Lobanow further stated that Yablkowski was detained, but not imprisoned. (For. Rel. 1895, II. 1109-1110.)

Mr. Breckinridge incorporated the substance of Mr. Olney's instructions of Nov. 4, supra, in a note to Prince Lobanow of Nov. 17/29, 1895, with which he also enclosed a copy of §§ 1999, 2000, and 2001 of the Revised Statutes of the United States. (For. Rel. 1895, II. 1112.)

Prince Lobanow, Dec. 5/17, 1895, wrote: "This question will be the subject of a careful examination on the part of the Imperial Government." (For. Rel. 1895, II. 1113.)

For a report of the American consul at Warsaw concerning the case in 1896, see For. Rel. 1896, 507-509.

January 14/26, 1897, the Russian foreign office informed the United States legation that the prosecution had come to an end in conformity with the Imperial manifest of November 14/26, 1894, consequent

upon a verdict rendered by the court of appeals at Warsaw, April 9/21, 1896, and that Yablkowski had been set free April 11/23, 1896. The prosecuting attorney at Warsaw informed the United States consul there that the documents taken from Yablkowski were attached to the judicial proceedings under the second part of paragraph 325 of the criminal code. (For. Rel. 1897, 446-447.)

John Ginzberg, a naturalized citizen of Russian origin, was arrested in Russia in 1894. It was stated by the Russian authorities that the cause of his imprisonment was a charge of military desertion, but he was also described by them as a "Russian subject."<sup>a</sup> With reference to the possibility of his being prosecuted for having acquired American citizenship, Mr. Olney, Secretary of State, in an instruction to Mr. Peirce, *chargé d'affaires ad interim* at St. Petersburg, said: "The Government of the United States can never acquiesce in any claim of any other government to penalize the act of naturalization when lawfully granted within our jurisdiction to one of its former subjects or citizens."<sup>b</sup>

Sept. 9, 1896, the criminal court of Minsk found Ginzberg guilty "in that, being a Russian subject, he left his native land and went to America, and on August 10, 1886, became, without permission of the Government, a naturalized citizen of the United States of America, and that in the autumn of 1894 he voluntarily returned to Russia." He was therefore sentenced, under § 325, part 1, of the Penal Code, to deprivation of all civil rights and perpetual banishment from the Empire, and to payment of costs, should he be able to pay them. It was adjudged that the documents relating to his identification, which were issued by the Government of the United States, but were then held by the court, should be returned to him.<sup>c</sup>

Ginzberg requested the legation of the United States at St. Petersburg to prefer a claim in his behalf against the Russian Government for 730 days' detention at \$3 a day. The legation submitted this request to the Department of State, which decided to "await further and more definite information" before expressing an opinion upon the claim.<sup>d</sup>

The embassy secured for Ginzberg an opportunity to work his passage from Libau to Antwerp and turned over to him 95 rubles, the amount of a draft which had been received for him from the United States. An official of the foreign office remarked that Ginzberg had, according to the usual practice, "been very leniently dealt with." In a report, subsequently to the departure of Ginzberg from

<sup>a</sup> For. Rel. 1895, II. 1081, 1085, 1086.

<sup>b</sup> For. Rel. 1895, II. 1091.

<sup>c</sup> For. Rel. 1896, 512-513.

<sup>d</sup> Mr. Olney, Sec. of State, to Mr. Breckinridge, *min.* to Russia, Oct. 27, 1896. For. Rel. 1896, 509, 511.

Russia, Mr. Breckinridge said: "I may remark that an apparent result of the continuous and earnest efforts of the past two or more years is some amelioration of the unbending severity that previously marked the policy of the Russian Government in cases of this kind. Until, however, the still ineffectual efforts to effect a conventional arrangement with Russia, upon the subject of expatriation, are more successful, our citizens of Russian origin, unless with previous Russian consent, expose themselves to the gravest hardship by returning to the Empire."<sup>a</sup>

The Department of State in reply observed that the "happy disposition" of the case might "illustrate the advantage of dealing with such matters in a friendly way, without unnecessary argument on the principles involved, as to which the views of the United States and Russia are apparently irreconcilable."<sup>b</sup>

Henry Topor, a naturalized citizen of the United States of Russian origin, who was arrested in Russia for having emigrated and become naturalized without permission, was, on its appearing that he was mentally unsound, placed in an insane asylum, from which he was released on his relations furnishing him assistance and an escort to the United States.

For. Rel. 1896, 523-529.

"The published correspondence for a number of years back has shown the persistence of the United States in endeavoring to obtain for its citizens, whether native or naturalized and irrespective of their faith, the equality of privilege and treatment stipulated for all American citizens in Russia by existing treaties. Holding to the old doctrine of perpetual allegiance; refusing to lessen its authority by concluding any treaty recognizing the naturalization of a Russian subject without prior Imperial consent; asserting the extreme right to punish a naturalized Russian on return to his native jurisdiction, not merely for unauthorized emigration, but also specifically for the unpermitted acquisition of a foreign citizenship; and sedulously applying, at home and through the official acts of its agents abroad, to all persons of the Jewish belief the stern restrictions enjoined by Russian law, the Government of Russia takes ground not admitting of acquiescence by the United States because at variance with the character of our institutions, the sentiments of our people, the provisions of our statutes, and the tendencies of modern international comity.

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<sup>a</sup> Mr. Breckinridge, U. S. min., to Mr. Sherman, Sec. of State, March 8, 1897. For. Rel. 1897, 435, 436.

<sup>b</sup> Mr. Sherman, Sec. of State, to Mr. Breckinridge, min. to Russia, March 25, 1897, For. Rel. 1897, 436.

“Under these circumstances conflict between national laws, each absolute within the domestic sphere and inoperative beyond it, is hardly to be averted. Nevertheless, occasions of dispute on these grounds are happily infrequent, and in a few worthy cases, where the good faith of the claimant's appeal to American protection has appeared, the friendly disposition of Russia toward our country and people has afforded means of composing the difference.”

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxix.

Early in 1897 Mr. Frederick G. Grenz, a naturalized American citizen of Russian origin, was arrested in Russia on a charge of having renounced his allegiance without permission, under article 325 of the Penal Code. He was born in Russia in 1854 and emigrated to the United States in 1888, having performed or been exempted from military service and having received permission to leave Russia. He returned to Russia on a brief visit, for the purpose of seeing his aged mother. Mr. Heenan, American consul at Moscow, petitioned the court before which the case was pending to dismiss the case, especially as there was no question of military duty involved. When the case came to trial Mr. Grenz was unconditionally acquitted, and his money and papers were returned to him. (Mr. Breckinridge, min. to Russia, to Mr. Sherman, Sec. of State, No. 490, Feb. 28, 1897, 50 MS. Desp. Russia; Mr. Sherman to Mr. Breckinridge, March 16, 1897, MS. Inst. Russia, XVII. 553; same to same, April 19, 1897, id. 566; Mr. Breckinridge to Mr. Sherman, No. 551, May 12, 1897, 50 MS. Desp. Russia; Mr. Sherman to Mr. Breckinridge, No. 429, June 18, 1897, MS. Inst. Russia, XVII. 587.)

With a dispatch of March 11, 1897, Mr. Breckinridge, minister of the United States at St. Petersburg, enclosed to the Department of State a note of Count Lamsdorff, of Feb. 20–March 4, 1897, replying to certain inquiries as to the Russian law concerning expatriation. Although the reply did not fully state how long the claims of the Empire continued to attach to the foreign-born descendants of Russian subjects, Mr. Breckinridge said he had been orally informed by the legal adviser of the foreign office that they continued without limit as to generations of descent, regardless of the place of birth. It was understood that a law had for sometime been under consideration to repeal that part of the law which extended “the prescribed claims and penalties to descendants of claimed Russian subjects born abroad.”

For. Rel. 1897, 439, 440.

Count Lamsdorff's note was accompanied with the following memorandum, in which various articles of the Russian law are reproduced:

“Question. Does the change of allegiance without consent entail loss of property as well as loss of civil rights and liability to banishment?”

“Answer. Articles 325 and 326 of the Criminal Code:

“Article 325. Whoever, absenting himself from the fatherland, enters into the service of a foreign power without the permission of the Govern-

Russia, Mr. Breckinridge said: "I may remark that an apparent result of the continuous and earnest efforts of the past two or more years is some amelioration of the unbending severity that previously marked the policy of the Russian Government in cases of this kind. Until, however, the still ineffectual efforts to effect a conventional arrangement with Russia, upon the subject of expatriation, are more successful, our citizens of Russian origin, unless with previous Russian consent, expose themselves to the gravest hardship by returning to the Empire."<sup>a</sup>

The Department of State in reply observed that the "happy disposition" of the case might "illustrate the advantage of dealing with such matters in a friendly way, without unnecessary argument on the principles involved, as to which the views of the United States and Russia are apparently irreconcilable."<sup>b</sup>

Henry Topor, a naturalized citizen of the United States of Russian origin, who was arrested in Russia for having emigrated and become naturalized without permission, was, on its appearing that he was mentally unsound, placed in an insane asylum, from which he was released on his relations furnishing him assistance and an escort to the United States.

For. Rel. 1896, 523-529.

"The published correspondence for a number of years back has shown the persistence of the United States in endeavoring to obtain for its citizens, whether native or naturalized and irrespective of their faith, the equality of privilege and treatment stipulated for all American citizens in Russia by existing treaties. Holding to the old doctrine of perpetual allegiance; refusing to lessen its authority by concluding any treaty recognizing the naturalization of a Russian subject without prior Imperial consent; asserting the extreme right to punish a naturalized Russian on return to his native jurisdiction, not merely for unauthorized emigration, but also specifically for the unpermitted acquisition of a foreign citizenship; and sedulously applying, at home and through the official acts of its agents abroad, to all persons of the Jewish belief the stern restrictions enjoined by Russian law, the Government of Russia takes ground not admitting of acquiescence by the United States because at variance with the character of our institutions, the sentiments of our people, the provisions of our statutes, and the tendencies of modern international comity.

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<sup>a</sup> Mr. Breckinridge, U. S. min., to Mr. Sherman, Sec. of State, March 8, 1897. For. Rel. 1897, 435, 436.

<sup>b</sup> Mr. Sherman, Sec. of State, to Mr. Breckinridge, min. to Russia, March 25, 1897, For. Rel. 1897, 436.

“Under these circumstances conflict between national laws, each absolute within the domestic sphere and inoperative beyond it, is hardly to be averted. Nevertheless, occasions of dispute on these grounds are happily infrequent, and in a few worthy cases, where the good faith of the claimant's appeal to American protection has appeared, the friendly disposition of Russia toward our country and people has afforded means of composing the difference.”

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxix.

Early in 1897 Mr. Frederick G. Grenz, a naturalized American citizen of Russian origin, was arrested in Russia on a charge of having renounced his allegiance without permission, under article 325 of the Penal Code. He was born in Russia in 1854 and emigrated to the United States in 1888, having performed or been exempted from military service and having received permission to leave Russia. He returned to Russia on a brief visit, for the purpose of seeing his aged mother. Mr. Heenan, American consul at Moscow, petitioned the court before which the case was pending to dismiss the case, especially as there was no question of military duty involved. When the case came to trial Mr. Grenz was unconditionally acquitted, and his money and papers were returned to him. (Mr. Breckinridge, min. to Russia, to Mr. Sherman, Sec. of State, No. 490, Feb. 26, 1897, 50 MS. Desp. Russia; Mr. Sherman to Mr. Breckinridge, March 16, 1897, MS. Inst. Russia, XVII. 553; same to same, April 19, 1897, id. 566; Mr. Breckinridge to Mr. Sherman, No. 551, May 12, 1897, 50 MS. Desp. Russia; Mr. Sherman to Mr. Breckinridge, No. 429, June 18, 1897, MS. Inst. Russia, XVII. 587.)

With a dispatch of March 11, 1897, Mr. Breckinridge, minister of the United States at St. Petersburg, enclosed to the Department of State a note of Count Lamsdorff, of Feb. 20–March 4, 1897, replying to certain inquiries as to the Russian law concerning expatriation. Although the reply did not fully state how long the claims of the Empire continued to attach to the foreign-born descendants of Russian subjects, Mr. Breckinridge said he had been orally informed by the legal adviser of the foreign office that they continued without limit as to generations of descent, regardless of the place of birth. It was understood that a law had for sometime been under consideration to repeal that part of the law which extended “the prescribed claims and penalties to descendants of claimed Russian subjects born abroad.”

For. Rel. 1897, 439, 440.

Count Lamsdorff's note was accompanied with the following memorandum, in which various articles of the Russian law are reproduced :

“Question. Does the change of allegiance without consent entail loss of property as well as loss of civil rights and liability to banishment?

“Answer. Articles 325 and 326 of the Criminal Code:

“Article 325. Whoever, absenting himself from the fatherland, enters into the service of a foreign power without the permission of the Govern-

ment, or becomes the subject of a foreign power, is liable, for this violation of his duty and oath of fidelity to the loss of all his civil rights and perpetual banishment from the Empire, or, if afterwards he returns voluntarily to Russia, to deportation to Siberia.

"Article 326. Whoever, absenting himself from the fatherland, does not return to it upon being invited to do so by the Government, is equally liable, for the infraction, to the loss of all civil rights and to perpetual banishment from the Empire, if within the term fixed at the option of the court he does not show that he has been impelled by circumstances independent of his will or, at the least, extenuating circumstances. Up to that moment he is considered as absent, disappeared from his domicile, and his property is placed under guardianship, according to the regulations established to this effect by the civil laws.

"The property of a person sentenced to the loss of civil rights is not confiscated, but passes to his legitimate heirs under the same laws which would be applied in the case of his natural death. The heirs can also claim possession of all property which might come by inheritance to the culprit after his condemnation.

"The wife of the person deprived of civil rights has the right to claim a divorce. Furthermore, the culprit loses his paternal authority over his children born prior to his condemnation.

"Articles 24, 26, 27, 28 of the Penal Code:

"Article 24. The loss of civil rights does not affect the wife of the convict nor his children born or conceived prior to his condemnation, nor their descendants.

"Article 26. Deportation to Siberia entails the loss of all family and property rights.

"Article 27. The loss of family rights consists in the termination of paternal authority over the children born prior to the condemnation, if the children of the convict have not followed him into deportation, or if they left him afterwards.

"Article 28. Following the loss of property rights, all property which belonged to the convict sentenced to enforced labor or to deportation, passes, from the day of execution of the sentence, to his legal heirs, in such a manner as it would pass in the case of the natural death of the convict.

"The proceedings and sentence for infraction provided for in article 325 of the Penal Code follow the ordinary course of criminal procedure.

"The examining judge proceeds in an investigation upon the official evidence of the police and local authorities or upon the requisition of the procureur. Persons charged with illegal absence from the fatherland are transferred before a court of justice after arrest at the frontier or on the territory of the Empire.

"They may, however, be prosecuted by default if they do not answer to the summons of the court after legal citation to appear has been inserted in the newspapers or addressed to the delinquent through our diplomatic and consular agencies.

"Question. If the property be confiscated is it only during the life of the offender, or does it remain forever alienated from his heirs?

"Answer. See the reply given above.

"Question. What, if any, are the penalties provided for those who emigrate in childhood or during their minority and subsequently become

citizens or subjects of a foreign country without imperial consent? And what is the period of minority?

"Answer. They entail all the consequences mentioned in the first reply, if they do not take the steps necessary when they attain their majority, which is fixed at 21 years of age.

"Article 221, Vol. X, first part of Civil Code:

"Article 221. The rights to fully dispose of one's property, to contract obligations are not acquired before coming of age, that is to say, before 21 years of age.

"Question. Is military service claimed if it matures while a subject is abroad and after he has sworn allegiance to another country? And what are the penalties for failure to return and perform such service?

"Answer. By virtue of article 3 of the Regulation of Military Service, persons above 15 years of age can not ask supreme permission to avoid the duties incumbent upon Russian subjects before having acquitted their military obligations. Persons who have attained the age of 20 years and over, who sojourn abroad, are notified to respond to the military service. In case they fail to respond to this call, they entail the penalties indicated in the above-mentioned article 326 of the Penal Code.

"Question 5. What is the status, in the foregoing respect, of the children and further descendants born in the country to which the father may have sworn allegiance or in which he may have acquired citizenship, as herein contemplated?

"Question 6. Can any of these descendants inherit property or in any way acquire title to property in the Empire?

"Answer to questions 5 and 6. The children of a Russian subject, born in legitimate marriage, even in the case their father may have lost his civil rights, are considered as Russian subjects and have a right to hold property in the Empire, whether by succession or by any other legal means of acquisition."

The Russian legation at Washington having informed a naturalized citizen of the United States of Russian origin, who sought permission to revisit his native land, that "every one who left Russia before his enlistment in the army on his return to that country must serve his term, which is five years," the Russian Government, in response to an inquiry by the United States, stated that the five years' military service was "not in lieu of the penalties established by article 325 of the Penal Code for unlawful abandonment of Russian subjection. All the subjects of the Empire, without distinction of religion, are held to serve during that time under the flag."

Count Lamsdorff, Imp. ministry of for. aff., to Mr. Hitchcock, U. S. min., Dec. 8/20, 1897, For. Rel. 1897, 438, 439.

"I have the honor to inform you that it is a punishable offense under Russian law for a Russian to become a citizen of any other country without Imperial consent, and that, consequently, this Government can not encourage American citizens whom the law might affect to expect immunity from its operations if they place themselves within its sphere.



"If, in addition, Mr. Haskell is of the Jewish faith, he would be prevented from entering Russia also by the Russian law which prohibits the Russian consular officers abroad from visaing, without authority previously obtained, the passports of Hebrews, except in the case of certain exempted classes, "which are bankers and chiefs of commercial houses of known importance, and brokers, representatives, clerks and agents of said houses having papers showing authority to represent them. In these cases the consular officers are directed to notify the minister of the interior that they have visaed such passport."

Mr. Hay, Sec. of State, to Mr. Belmont, Jan. 25, 1900, 242 MS. Dom. Let. 391.

"The Department is just in receipt of a despatch from our minister at St. Petersburg stating that Mr. Marks Nathan, an American Hebrew, had received permission from the minister of the interior to visit certain places in Russia, his request for that permission having been supported by the good offices of the United States legation." (Mr. Adee, Second Assist. Sec. of State, to Mr. Aarons, Nov. 9, 1897, 222 MS. Dom. Let. 290.)

"Petitions for release from Russian allegiance should be addressed by the applicant directly to the minister of the interior at St. Petersburg." (Mr. Hill, Assist. Sec. of State, to Mr. Monkiewicz, March 10, 1899, 235 MS. Dom. Let. 382.)

(14) SERBIA.

§ 454.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Ordinarily all subjects of Serbia are expected to perform at least two years' military service after they attain manhood.

"If a subject of Serbia emigrates before he has fulfilled his military obligations, the Servian Government does not recognize a change of nationality made without the consent of the King, and upon his return he may be subject to molestation.

"If, however, he performed his military service before emigration, his acquisition of naturalization in the United States is recognized by the Servian Government.

"There is no treaty between the United States and Serbia defining the status of naturalized Americans of Servian birth returning to Serbia."

Circular notice, Department of State, Washington, April 10, 1901, For. Rel. 1901, 455.

## (15) SPAIN.

## § 455.

"Referring to your enquiry of January last, I have now to inform you that, according to a note of the Spanish minister of state, enclosed in despatch No. 270, from Madrid, the provisions of the following decree of Nov. 17, 1852 (art. 45), still apply to the case of a Spaniard who becomes naturalized, without complying with the law of military service, and returns to Spain in the character of foreigner, viz:

"A foreigner naturalized in Spain and a Spaniard naturalized in the territory of another power without the knowledge and authority of their respective governments, shall *not* be exempt from the obligations belonging to their original nationality, although the Spanish subject in other respects loses the quality of Spaniard in accordance with the provisions of par. 5, art. 1 of the Constitution of the Monarchy."

Mr. Bayard, Sec. of State, to Mr. Blanco, Nov. 23, 1887, 166 MS. Dom. Let. 201.

In a dispatch to Mr. Bayard, No. 241, Aug. 19, 1887, Mr. Strobel, chargé d'affaires ad int. at Madrid, said:

"In accordance with instructions, an official statement has been requested of the minister of foreign affairs of the laws of Spain now in force 'affecting the status or liabilities of former subjects, once owing military service, who have been naturalized in foreign countries, should such persons visit their native country.'

"It may not be improper in the meantime to give what my own examination shows the law on the subject to be.

"Article I. of the constitution of 1876, now in force, says: 'The quality of Spaniard is lost by naturalization in a foreign country . . .'

"Article 14 of the conscription law of July 11, 1885, also in force, makes the following provision: 'Only Spaniards shall be admitted to service in the army in any position whatever.'

"It seems, therefore, that a Spaniard naturalized in a foreign country is not only exempt, under any circumstances, from military service in Spain, but is actually prohibited therefrom.

"I have assumed that the words, 'once owing military service' in the instructions referred to, mean simply 'liability' and not 'actually drafted.'

"In the latter case, the question of desertion or criminality under martial law might arise." (For. Rel. 1887, 908.)

As a matter of fact, Spain habitually recognized, in Cuba, the full effect of American naturalization in the case of her native subjects who had been admitted to citizenship in the United States.

For an exhaustive examination of the law of Spain, see Moore. Int. Arbitrations, III. 2601-2613.

See, also, Mr. Evarts, Sec. of State, to Mr. Fairchild, min. to Spain, No. 20, May 11, 1880, 18 MS. Inst. Spain, 471-475.

## (16) SWITZERLAND.

## (a) SWISS LAW OF 1876.

## § 456.

By article 6 of the Swiss Federal law of July 3, 1876, concerning the acquisition and renunciation of Swiss citizenship, a Swiss citizen may renounce his citizenship if (1) he has no domicile in Switzerland; (2) he is enjoying full civil rights under the laws of the country where he resides; (3) he has already acquired citizenship in another country, or the assurance of its being granted; for himself, his wife, and minor children, when they are domiciled or living with him.

By article 7 the declaration of renunciation must be submitted in writing, accompanied with the required statements, to the cantonal government, which will notify the proper communal authorities, in order that notice may be given to any interested parties; and a term of four weeks is allowed for the presenting of objections. If objections are made, the decision upon them is rendered by the Federal Tribunal according to articles 61-63 of the law of June 27, 1874, in regard to the organization of the federal judiciary.

By article 8, if the conditions prescribed in article 6 are fulfilled and no objections are presented, or if objections were made, but have been judicially overruled, then the authorities authorized for the purpose by cantonal law will pronounce the discharge from the cantonal and communal citizenship. This discharge includes the loss of Swiss citizenship, and takes effect from the date of its issue and delivery to the applicant; and it extends to the wife and minor children, when they are domiciled or living with the applicant, if no special exceptions were made with regard to them.

By article 9 provision is made for the readmission to Swiss citizenship of persons who have lost it.

Articles 1-5 of the law relate to Swiss naturalization. Article 5 declares "persons who, in addition to being Swiss citizens, are citizens of a foreign country, are not entitled to the privileges and the protection accorded to Swiss citizens during their residence in such foreign state."

By article 10, all provisions of federal or cantonal legislation conflicting with the law of July 3, 1876, are abrogated.

Mr. Rublee, chargé d'affaires to Switzerland, to Mr. Fish, Sec. of State, Aug. 31, 1876, enclosing a copy and translation of the law in question. (For. Rel. 1876, 567.)

"I believe that the remedy [for difficulties growing out of the detention in Switzerland of the property of natives of the country who have been naturalized in the United States] would be best attained were every Swiss, immediately upon his naturalization in the United States, to comply, so far as within him lies, with the provisions of the

Swiss federal law of July 3, 1876 . . . and that in every case where such compliance was thwarted by the action of the communal or cantonal authorities, the legation should be instructed to intervene diplomatically, and, failing to succeed, it should be empowered, after reference to the Department of State, to carry the appeal to the Tribunal Fédéral." (Mr. Fish, chargé d'affaires to Switzerland, to Mr. Evarts, Sec. of State. Oct. 18, 1879, For. Rel. 1879, 973, 974.)

(b) DIPLOMATIC DISCUSSIONS.

§ 457.

"Your dispatch No. 218, of the 18th ultimo, has been received. It relates to the detention by the Swiss local authorities of property in Switzerland claimed by natives of that country naturalized in the United States. The reasons assigned for that detention are believed to be so insufficient practically, morally, and legally that it is hoped the Federal Government of that country will lose no time in applying its authority or influence towards redressing the grievance.

"It is noticed with regret that the Swiss local authorities, at least, are disposed to maintain the doctrine of perpetual allegiance by denying the right of a native of that country to become naturalized elsewhere without their consent.

"This pretension has always been regarded here as extravagant, and as such has been resisted, so that several of the most important European countries with monarchical governments, which were most strenuous in supporting it, have receded from their claims, and have concluded naturalization treaties with the United States. Switzerland as yet has no such treaty, but the convention of 1850 between the United States and that country contains stipulations which seem applicable to the present case and adequate for disposing of it contrary to the views held in that quarter.

"It appears from your dispatch that one of the claims of the communal authorities is that they can recognize no native of Switzerland as a citizen of the United States who shall not have obtained their consent to his naturalization. This pretension is in direct conflict with the fourth article of the treaty, which says that in order to establish their character as citizens of the United States of America, persons belonging to that country shall be bearers of passports certifying their nationality. If, therefore, the nationality of any Swiss naturalized here, who may visit his native country with such passport, shall there be questioned, that act must be looked upon as a flagrant violation of the treaty, which could not be acquiesced in.

"Again, the fifth article stipulates in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

"An authenticated copy of the judgment of the court which may have naturalized a Swiss citizen must be regarded as conclusive proof of that act in regard to all such naturalized Swiss who may not visit their native country.

"As explicit abjuration of allegiance to his native country is by law required of every foreigner naturalized here, the fact of such abjuration is mentioned in the record. It is presumed, therefore, that when a duly attested copy of such record is presented to the authorities in Switzerland, the sufficiency of the proof which it contains will be acknowledged without hesitation.

"You intimate that the supreme court of the Confederation might decide the question conformably to the views entertained here, and suggest that a test case be prosecuted for the purpose of obtaining their opinion. This course it would be difficult and inconvenient for this Government to adopt, but it might be the most eligible for a claimant to sufficient property in that country to incur the hazard and expense which would attend it."

Mr. Evarts, Sec. of State, to Mr. Fish, min. to Switzerland, Nov. 12, 1879, For. Rel. 1880, 952.

Mr. Fish, in his No. 218, Oct. 18, 1879, to which the foregoing was a reply, referring to the refusal of recognition of American naturalization in the case before him, said: "This refusal of the communal authorities was supported by the cantonal government, and appears even to have had the sanction of the Federal Government, inasmuch as the latter transmitted it to the legation. It was not until the diplomatic representations of the legation had been brought to bear upon these objections that the unreasonable requirements of the commune and canton were allayed." (For. Rel. 1879, 973.)

"There is no law of the Canton of Zurich [on nationality and military service] referred to by Mr. Fish at p. 793, For. Rel. for 1879. What is referred to is the action of the communal and cantonal authorities in enforcing the federal law." (Mr. Broadhead, min. to Switzerland, to Mr. Olney, Sec. of State, No. 87, Aug. 16, 1895, 29 MS. Desp. Switz.)

Albert Meyer was born in Zurich in 1842. He emigrated at the age of eighteen, and in 1864, when twenty-two years old, came to the United States and settled in the city of New York, where he entered into business as a merchant and continued to reside. In due time he became a naturalized citizen of the United States. Some years later the firm of which he was a member became embarrassed and granted certain preferences to creditors. A firm in Zurich instituted civil proceedings in New York to have these preferences set aside, but the court upheld them as lawful. Subsequently, the Swiss firm brought a criminal action against Mr. Meyer at Zurich, based on the same acts. The American legation at Berne was instructed, July 14, 1882, to bring the subject to the attention of the Swiss Government. In another instruction, December 19, 1882, the Department of State said:

"While this Government does not for a moment question the right of that of Switzerland to attach such conditions as it may deem proper to the emigration of its citizens, and while it also admits that an American citizen who, while in Switzerland, commits an offense against the criminal laws of that country, may properly be held to answer for such offense before the courts of Switzerland, it cannot give its assent to a doctrine so fraught with danger to the rights of American citizens as that which holds that a citizen of the United States of Swiss nativity may be tried before the criminal courts of Switzerland for acts done or committed within the territories of the United States. That the matter for which Mr. Meyer was held criminally liable in Zurich, is not only not criminal in this country, but is authorized by its laws, simply aggravates this particular case.

"Had his act constituted an offense against the criminal code of the United States or against the laws of the State of New York, this Government would still hold that he was amenable for such offense in the courts of the United States, or of the State of New York, as the case might be, and in these courts only.

"The naturalization of an alien in the United States is the voluntary act of the party himself. Under the laws of the United States, the consent of the Government of the country of his origin is not made a condition of his admission to citizenship, and when he has once attained the character of a citizen of the United States, it is held by the Government and laws of the United States to adhere to him with its proper rights and privileges, not only within the United States, but in any foreign country in which he may be, not excepting the country of his nativity or origin."

Mr. Frellinghuysen, Sec. of State, to Mr. Cramer, min. to Switzerland, No. 17, Dec. 19, 1882, MS. Inst. Switzerland, II. 157.

October 17, 1882, Mr. Cramer reported that he had received from the Swiss Government an extract from the records of the courts of appeal and cassation of the canton of Zurich, and also a copy of a communication from the supreme court of the canton to the executive council, dated September 16, 1882, by which it appeared that Mr. Meyer had been found guilty and sentenced to a year's imprisonment. Mr. Cramer stated that it further appeared from the last-mentioned document that Mr. Meyer was held still to be a citizen of Switzerland, because he had not surrendered the rights and privileges of Swiss citizenship, and that the high federal council, in view of the action of the courts, was unable to interfere in the case. It appears that when the sentence was passed Mr. Meyer was not in Switzerland. (Mr. John Davis, Act. Sec. of State, to Mr. Bliss, Jan. 25, 1883, 145 MS. Dom. Let. 321.)

July 28, 1883, Mr. Cramer was instructed to call the attention of the Swiss Government to the position of the United States with regard to the protection of all its citizens abroad, whether native or naturalized, and to say that the President expected and entertained the hope that the Swiss Government would find means to relieve Mr. Meyer from

the sentence hanging over him, so that he might visit that country, whenever business called or inclination prompted him, with the same freedom from molestation as a citizen of Switzerland would enjoy in the United States. (Mr. Frelinghuysen, Sec. of State, to Mr. Cramer. min. to Switzerland, No. 47, July 28, 1883, MS. Inst. Switzerland. II. 187.)

Subsequently, on a suggestion of Mr. Meyer's counsel that a renewal of the protests against the sentence might prove effectual, Mr. Frelinghuysen said: "Observing that we do not admit the contention of Switzerland in the above case, I have to ask that any action warranted by previous instructions, and the circumstances, may be taken at the proper time. An understanding as to this class of cases is very desirable." (Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, min. to Switzerland, No. 72, Jan. 24, 1884, MS. Inst. Switzerland, II. 207.)

Carl Heinrich Weber, of Zurich, born in 1845, emigrated to the United States in 1873. He was then, and afterwards continued to be, under guardianship in Switzerland. In 1879, having acquired American citizenship, he applied to the authorities of the canton of Zurich for his release from Swiss citizenship. His application was opposed by his sister and his guardian, as well as by the orphans' court of Zurich, and later by the city council of Zurich. The case was ultimately brought before the high federal court, which, while admitting that, as a question of principle, a ward could not legally change his domicile without his guardian's consent, found as a fact that Weber's change of domicile was made with his guardian's tacit consent, and requested the authorities of the canton of Zurich to release him from his cantonal and town citizenship.

For. Rel. 1889, 689-691.

"It will be necessary for you to assert your claim to property in Switzerland through legal proceedings in its courts, in the course of which you will be able to avail yourself of the foregoing precedent. If such proceedings should be delayed or obstructed, especially on the ground of your American citizenship, it would be proper for you to communicate fully all the facts to this Department, which, upon proof of your naturalization, would then take such action, if any, as it properly might under the circumstances." (Mr. Foster, Sec. of State, to Miss Fülleman, Dec. 20, 1892, 189 MS. Dom. Let. 503.)

See the case of Jacob Zimmermann, For. Rel. 1879, 973; For. Rel. 1880, 952.

In the case of Fred Tschudy, a native of Switzerland, who had been naturalized in the United States and, on his return to Switzerland, was ordered to report for military duty, the minister of the United States at Berne, while maintaining the views of his Government as to the right of expatriation, also argued that the provisions of Article II. of the treaty between the United States and Switzerland of 1850, exempting "the citizens of one of the two countries,

residing or established in the other," from military service, should, in the absence of any qualification or explanation of the word "citizens," be held to include all citizens, whether native or naturalized, of either Government.

Mr. Broadhead, min. to Switzerland, to Mr. Lachenal, min. of foreign affairs, Aug. 17, 1894, For. Rel. 1894, 685.

See, also, Mr. Uhl, Act. Sec. of State, to Mr. Broadhead, min. to Switzerland, Sept. 12, 1894, For. Rel. 1894, 686, approving Mr. Broadhead's presentation of the matter.

"Each state is entirely free to regulate as it suits it the extent and effect of its right of citizenship, as well as the conditions upon which it can be acquired and lost. Then the legislation in this matter provides expressly that a native-born Swiss can not lose it, by the fact even of having acquired a foreign nationality, but only when the interested party has renounced by a declaration in good and due form his quality as a Swiss citizen, and has obtained the authorization *ad hoc* of competent authority. (Constitution Federal, Art. 44, Federal Law of 3d July, 1876, arts. 6, 7, and 8.)

"The interpretation which you believe you are able to give to art. 2 of the treaty in support of the demand of Mr. Tschudy can not be admitted in this case. The principle which inspires that article (2) is found in effect in almost all the treaties of settlement concluded between Switzerland and many powers, and no state has ever pretended by that to benefit persons who possess a double right of citizenship.

"It is contrary to the law of nations that a foreign state should intervene in the relations of a state with one of its own subjects, and it is for that reason that if Mr. Tschudy, being in the United States, found himself in a conflict of some nature with the government of that country, the federal council would not believe that it had the power to interpose, and would not fail on the contrary to acknowledge the American nativity of the above named (*l'indigénat Américain du susnommé*). We can then but repeat that as long as Mr. Tschudy has not lost the quality of a Swiss citizen by a formal renunciation and admission by competent authority, he will not be authorized to avail himself in Switzerland of the quality of an American citizen and must remain submissive to the military obligations, or their equivalent, in force in his original country."

Mr. Lachenal, Swiss min. of for. aff., to Mr. Broadhead, Am. min., Sept. 10, 1894, enclosed with Mr. Broadhead's No. 55, Sept. 18, 1894, 29 MS. Desp. Switzerland.

There are no cantonal laws on the subject of military service in Switzerland. The cantonal authorities are authorized to enforce the federal laws, which, in regard to the renunciation of allegiance and military service, are supreme.



Mr. Broadhead, min. to Switzerland, to Mr. Olney, Sec. of State, No. 87, Aug. 16, 1895, 29 MS. Desp. Switzerland.

With this dispatch Mr. Broadhead enclosed a translation of a synopsis furnished him by the Military Department, August 7, 1895, of the military laws of Switzerland so far as they relate to foreigners residing in that country and to natives of Switzerland who may have been naturalized abroad.

By this synopsis it appears that by paragraph 1, article 18, of the Swiss Federal Constitution of May 27, 1874, every Swiss citizen is held to military service. By the law of November 13, 1874, this service begins at the age of twenty, and the obligation to serve lasts till the end of the forty-fourth year. By article 1 of the law of June 28, 1878, every Swiss citizen of the requisite age, whether living in or outside of Switzerland, who does not personally perform military service, is subject to a compensatory tax, and foreigners established in Switzerland are equally subject to this tax unless they are exempted by international treaties or belong to a state in which Swiss citizens are bound neither to military service nor to the payment of an equivalent tax.

With the same dispatch Mr. Broadhead also enclosed printed copies in French and German of a circular issued by the Swiss Federal Council, July 19, 1894, to the Confederate States, concerning the tax for exemption from military service of Swiss citizens living in the United States and of citizens of the United States domiciled in Switzerland. In this circular it is stated:

1. Swiss citizens who are established in the United States or who have returned from that country to Switzerland are subject, from May 1, 1894, to the tax for exemption from military service, and are consequently to be inscribed on the rolls of that tax unless they can prove that they have paid a similar tax in the United States.
2. Citizens of the United States established in Switzerland are, according to the circular, exempt from the military tax, but they are to cease to enjoy that exemption whenever Swiss citizens established in the United States are subjected to the payment of a military tax.

Mr. Broadhead stated that, according to the decree of the Federal Council of February 5, 1886, rule 1, as above stated, applied to Swiss citizens whether they had been naturalized in the United States or not. This decree reads as follows:

- "1. The Swiss citizen who resides in a foreign country and is bound to military service, or to pay a corresponding tax, whether because he is likewise a citizen of that country, or for any other reason, is not held to pay the military tax in Switzerland for the time during which, residing in a foreign land, he has performed his military duties.
- "2. On the contrary, the Swiss who is at the same time a citizen of a foreign country, in which he is not bound by any military oath, can not invoke his double nationality so as to dispense with the payment of the military tax in Switzerland even for the time during which he has sojourned in a foreign land."

For correspondence in relation to the military tax prior to Mr. Broadhead's No. 87 of August 16, 1895, see For. Rel. 1894, 678-682.

"I have to acknowledge the receipt of your dispatches, Nos. 75 and 76, of the 15th and 18th ultimo, . . . having particular reference

to the case of Mr. F. A. Schneider, . . . who has been ordered by the military commander of the district of Zurich to report immediately for physical examination and military duty. . . .

"Mr. F. A. Schneider is, as you have previously reported in your dispatch, No. 45, of October 12, 1896, a native-born citizen of the United States, his father at the time of his birth being lawfully invested with the full and complete character of an American citizen by naturalization. . . . Whatever may be advanced in a contrary sense as respects the dual status of a person acquiring another allegiance without the consent of the state of his origin, this Government can not for an instant admit that such a contention is applicable to the case of a native-born citizen. So far as the knowledge of this Department exists—over more than a century of intercourse with its sovereign equals—no such contention has been maintained by any other Government, and if suggested has been emphatically denied.

"Even upon the careful statements you have recently made concerning the Swiss rule of a cantonal citizenship this extraordinary and exceptional doctrine of inherited allegiance appears nowhere distinctly formulated, and if it be put forward as a doctrine it not only finds no color in the received teachings of international law, but it is in itself faulty because apparently unlimited. There seems to be no end to the chain of inherited subjection which must ensue should the Swiss premise be admitted, for if a native-born son of a citizen of the United States can be claimed by Switzerland as a citizen because his father was formerly a Switzer, the grandson and the descendant of the remotest generations may with equal reason, or rather with equal unreasonableness, be claimed as Swiss citizens. . . .

"It seems that he [Mr. Schneider] is held to service purely and simply on the alleged score of owing paramount allegiance to Switzerland. In this respect Article I. of our treaty with Switzerland of November 25, 1850, appears to be distinctly contravened. At the time that treaty was concluded there was no question touching the attitude of the United States in the vital regard of citizenship. . . . Whatever may be argued as to the dual status of an individual forsaking his native land and embracing the allegiance of another government, or whatever claim may be made that the treaty between the United States and Switzerland may not specifically apply to those precise cases, there can be no doubt that the United States purposed and that Switzerland assented to the full protection of all native-born citizens of the United States. It is for the benefit of such that our treaties were and are concluded, and for their benefit we must claim their full application. This is not a question of an even counterpoise of claim between two conflicting jurisdictions in which each may in practice be supreme to enforce its own law over all affected

persons voluntarily resorting to its territories. Any theory of an equally balanced conflict of the laws between the two states is absolutely and necessarily excluded in the case of native-born citizens of either, they being in turn the sons of lawful citizens.

"It is proper that you should temperately but distinctly acquaint the Swiss Government with the view here entertained of the present question. Your firm and earnest remonstrance should be interposed in such shape as to leave no doubt in the mind of the Federal Council of the sincerity of our attitude and of our determination to uphold the rights of our native-born citizens, and the council should not be left in ignorance of the severe strain which the claim of indefinitely inherited allegiance so put forth in the case of Mr. Schneider and any person similarly situated may perforce impose upon the traditional and fast friendship which the United States feels for Switzerland."

Mr. Olney, Sec. of State, to Mr. Peak, min. to Switzerland, March 6, 1897, For. Rel. 1897, 562; MS. Inst. Switz. III. 59. See the claim of Russia, *supra*, p. 653.

"In your note of March 24, relative to the military service of Mr. Frederic Arnold Schneider, of Pfaffikon, Canton of Zurich, your excellency asks that the Federal Council reconsider its decision of March 5 last, which, in your opinion, is in harmony neither with the principles of international law nor with the treaty of settlement between Switzerland and the United States of November, 1850. . . .

"We regret the inability to recognize the logical basis of these arguments, which we should regard rather as being in manifest contradiction as well with the universally recognized doctrines of international law as with the fundamental principles, beyond all controversy, according to which a sovereign and independent state determines for itself the conditions and the manner whereby the quality of citizenship is acquired or lost.

"We are far from contesting that Mr. Schneider may not be, by the laws of the United States, an American citizen, but it remains no less true that by our public law he is a Swiss citizen, and that as such, finding himself within our jurisdiction, he is subject, in the same manner as all other citizens of Switzerland, to the inherent obligations of such quality. . . .

"Your excellency . . . is not ignorant of the fact that Swiss nationality, by virtue of a principle sanctioned by the constitution itself, is not lost by the simple fact of acquisition of a foreign domicile, but only following a renunciation expressly declared in the prescribed forms of the law of July 3, 1876. Now, if neither the father nor the son, Schneider, has as yet made this declaration, it follows that both are still citizens of their commune of origin of Pfaffikon,

and hence citizens of the Canton of Zurich and of the Swiss Confederation.

"We have certainly at heart the fulfillment of all our obligations contracted by solemn treaties with other countries, and we would not await the representations of your excellency to conform to the convention of November 25, 1850, if it were really applicable in this case. Article II. of this treaty declares, indeed, that the citizens of each of the two governments shall be exempt, in the other, from all personal military service, but there is not the shadow of a doubt that in order to determine the persons who shall be regarded as citizens of each of the two countries, the treaty must necessarily be referred to the laws in force in each of the two countries. It is, therefore, for Switzerland, the Swiss law which determines if a certain person living in Switzerland should be considered as a Swiss citizen; a contrary doctrine would imply the pretention of imposing upon Switzerland legislation not its own, which would be inadmissible and irreconcilable with its position as a sovereign and independent state.

"If the treaty of November 25, 1850, had the meaning which your excellency wishes to attribute to it in your letter of March 24, it would be difficult to understand what object the Government of the United States had in proposing many times the conclusion of a treaty stipulating, among other things, that 'any Swiss citizen who has been or shall be or is naturalized in the United States of America conformably to the law, shall be regarded in all ways and in every manner by the Swiss Federal Government as a citizen of the United States of America and treated as such by the Swiss Confederation.' Such a stipulation would be, indeed, superfluous if Switzerland was already obliged in virtue of the treaty of 1850 to recognize as American citizens and to treat as such all who could prove having acquired such quality conformably to the laws of the United States.

"The attitude taken by us in this matter is that which we have always taken toward all other Governments and that all other Governments have taken and take toward us. It is sufficient to recall, in this regard, the French laws of June 26, 1889, and of July 22, 1893, the effects of which were so widespread as to entail inconveniences upon many foreign governments. . . .

"We can not, then, in the absence of any international stipulation, admit that Mr. F. A. Schneider, son of a Swiss citizen, not having renounced his original nationality, should be regarded otherwise than all other Swiss citizens and freed from military duty. Mr. Schneider is not in the least forced to keep his Swiss citizenship against his will. He can renounce it in the forms provided by the law of July 3, 1876, and, if he does not do so, it is to be presumed that it suits him to remain a Swiss citizen in spite of the duties inherently attached to such quality.

" Besides, even in the case where the Swiss law would refuse to Mr. Schneider the right of renouncing his original nationality, it would not be disputed that Switzerland has the right to exact that he fulfill his obligations toward her. This point of view was participated in by an eminent American statesman, Mr. Daniel Webster, Secretary of State, who, in a note of June 1, 1852, to the minister of Prussia to the United States [the minister of the United States near the King of Prussia], observed that if a government did not accord to its subjects the right of renouncing their allegiance, it could, in all justice, reclaim their services any time they were found within its jurisdiction.

" We wish to hope that these explanations will suffice to convince your excellency that, greatly desirous as we are of maintaining with the United States of America the best relations and of being in accord with your Government, we can not accede to the request made in your letter of March 24 without departing from the laws and the constitution confided to our safe keeping."

The Swiss Federal Council to Mr. Peak, U. S. min., April 20, 1897, For. Rel. 1897, 564.

" But little appears to be gained in the way of detailed analysis of and answer to the note of the Swiss Federal Council of April 20, inasmuch as nearly all of the elaborate argument therein presented rests on a fallacious disregard of the essential point which the Department's instruction and your note of March 24 endeavored to present clearly to the Federal Government, viz, that, whatever may be said touching the application of express treaties of naturalization to the case of native subjects emigrating from one state to cast their lot in another and to become citizens thereof by due process of law, that conventional feature is wholly lacking in the case of persons native-born citizens of citizen fathers. By no just process of reasoning can it be claimed that such native-born citizens of citizen parentage are in the category of emigrants of whom the native state may exact renunciation of their original status as a condition to recognizing the acquisition of a new status. . . . What the note of the Swiss Federal Council says, therefore, respecting the necessity of treaties of naturalization to determine points of allegiance not covered by the general treaties of amity and commerce between states can not be admitted as having reference to the case of a native-born citizen of a citizen father. . . .

" It is observed that the note of the Swiss Federal Council rests its argument in part upon a citation from a note stated to have been written June 1, 1852, to the United States minister in Prussia by Daniel Webster, when Secretary of State. The citation is not quite accurate, for no instruction of the date and character described was

written by Mr. Webster. Under date of February 14, 1853, Mr. Webster's successor, Edward Everett, writing to Mr. Barnard at Berlin, in treating the case of naturalized citizens of the United States who had been drafted into the Prussian army upon their return to Prussia, refers to a letter written by Mr. Webster to a notary public of New York, named J. B. Nones, of June 1, 1852, in which, allowing for differences for translation, much the same language is found as in the citation made by the Swiss Federal Council.

"It is to be insisted upon, however, that the reference is only valid to the case involved, namely, those citizens of a foreign state who emigrate in evasion or omission of military service and acquire another status by naturalization. As to such persons the doctrine of dual allegiance equally subsisting toward the country of origin and the country of adoption, and necessarily regulated by a treaty of naturalization, may be applied as an academic proposition; but in point of fact the claim is not pressed, so far as known, by any state except Italy and Russia, unless the emigration shall have been at or near the military age and constitute of itself an evasive violation of the law of origin. . . .

"It is observable that throughout the note of the Swiss Federal Council the right of renunciation of citizenship is spoken of as pertaining to the individual, provided it be declared in the prescribed forms of the law of July 3, 1876. Although not recognizing the obligation of the native-born American son of an American citizen father to make the application of renunciation referred to, that procedure may afford a practical solution to a position which otherwise is and would remain intolerable as between two sovereign states. . . ."

Mr. Sherman, Sec. of State, to Mr. Peak, min. to Switzerland, May 12, 1897, *For. Rel.* 1897, 566; *MS. Inst. Switz.* III. 71.

The case was terminated by the acceptance by the Swiss Government, through the department of justice of the canton of Zurich, of a formal application which Mr. Schneider had made for release from Swiss citizenship. (*For. Rel.* 1897, 568, 569.)

In response to an inquiry whether a passport should be refused to a native-born Swiss who returned to the country of his origin after acquiring American citizenship, unless he could show that he had "formally renounced his Swiss citizenship in the manner prescribed by Swiss law," the Department of State said: "The laws of the United States do not require the consent of the Government of the alien's origin or a compliance with the laws of such country relative to renunciation of allegiance as a prerequisite to naturalization here. You would, therefore, not be justified in making it a condition to the issuance of a passport that the applicant shall show that he has form-

ally renounced Swiss citizenship in the manner prescribed by Swiss law."

In connection with this subject the legation raised the question whether a Swiss, in obtaining naturalization in the United States, could, without false swearing, renounce his allegiance to the land of his birth and be considered a bona fide citizen of the United States, so long as he conserved his Swiss citizenship, which he well knew that he could not lose, except by his own formal renunciation of it.

The Department of State replied: "This is, in effect, Can a person who obtains his certificate of naturalization by fraud be considered a bona fide citizen of the United States? Naturalization being a judicial act, there is no authority on the part of the executive to declare that a naturalized citizen of the United States is not a citizen because of fraud in the procurement of his citizenship. That can only be determined judicially by a competent court of the United States. But this does not interfere with the exercise of the discretionary power vested in the Secretary of State in the matter of granting passports and protecting American citizens abroad, and the Department's standing rule is to withhold a passport from any holder of naturalization papers found to have been obtained by fraud."

Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switzerland, Dec. 12, 1899, For. Rel. 1899, 764.

"The information given below is believed to be correct, yet is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"Every Swiss citizen is liable under Swiss law, to military service from the beginning of the year in which he becomes 20 years of age until the end of the year when he becomes 44. Every Swiss of military age who does not perform military service is subject to an annual tax, whether he resides in the Confederation or not, or to punishment for nonpayment of the tax if he returns to Switzerland.

"If a Swiss citizen renounces Swiss allegiance in the manner prescribed by the Swiss law of July 3, 1876, and his renunciation is accepted, his naturalization in another country is recognized, but without such acceptance it is not recognized, and is held to descend from generation to generation.

"Before he returns to Switzerland an American citizen of Swiss origin should file with the cantonal authorities his written declaration of renunciation of his rights to communal, cantonal, and in general Swiss citizenship, with documents showing that he has obtained foreign citizenship for himself, wife, and minor children, and receive the sealed document of release from Swiss citizenship through the direction of justice of the canton of his origin. If he neglects this and is within the ages when military service may be required, he is

liable to military tax, or to arrest and punishment in case of non-payment of the tax."

Circular notice, Department of State, Washington, Jan. 8, 1901, For. Rel. 1901, 499.

As to military service in Switzerland, see Mr. Broadhead, min. to Switzerland, to Mr. Olney, Sec. of State, No. 87, Aug. 16, 1895, 29 MS. Desp. Switz.

(c) FUTILE CONVENTIONAL NEGOTIATIONS.

§ 458.

"The United States of America proclaims and practices the principle that an American citizen can not belong to another nationality, and therefore, one wishing to obtain American citizenship must abjure his former nationality. From this has arisen in the international relations of that Republic with other countries, serious conflicts in regard to the state or home right, and a constant danger of resulting in *Heimatlosigkeit*, homeless people. . . . To correct these inconveniences the United States have repeatedly proposed to Switzerland the remedy employed by other states, the conclusion of a convention. But so far the Federal Council has been of the opinion that these overtures could not be entertained. This they have been impelled to in view of article 44 of the Federal Constitution, which prescribes that no canton shall deprive a citizen of his Swiss citizenship; and in view of the positive Swiss States right, according to which a Switzer can only by his own free act renounce his Swiss nationality, there was no power to change these principles by a treaty."

Report of a special commission to the Swiss Federal Assembly, 1887, For. Rel. 1889, 685.

Acting on a report made by the American legation at Berne, August 12, 1882, as to the willingness of the President of Switzerland to negotiate a naturalization convention with the United States, on the lines of the convention between the United States and Denmark of 1872, Mr. Frellinghuysen sent instructions, in which the legation was directed to make no concession that would invalidate the right of the United States to naturalize foreigners irrespective of their original obligations, since the United States could not "admit of qualified naturalization, subject to the consent of the country of origin." (Mr. Frellinghuysen, Sec. of State, to Mr. Cramer, No. 7, Oct. 19, 1882, MS. Inst. Switzerland, II. 148.)

November 7, 1882, Mr. Cramer submitted a draft of a convention to the President of the Confederation, who, after examining it, stated that it contained provisions which were in conflict with the laws of Switzerland, but without specifying the particular conflicts. (Mr. Cramer to Mr. Frellinghuysen, No. 37, Feb. 22, 1883, 21 MS. Desp. Switzerland.)

In his No. 161, August 2, 1884, Mr. Cramer again adverted to the subject, and on September 16, 1884, was authorized to reopen negotiations on the basis of his instructions. He did so November 5, 1884. The Swiss



Government replied, February 20, 1885, that Swiss nationality depended on citizenship "of or in a canton;" that article 44 of the Swiss constitution forbade the cantons to deprive anyone of his citizenship, and that the Confederation also had no such authority; and that consequently the Confederation lacked the competence to agree that the acquisition of citizenship in the United States should result in the loss of Swiss citizenship. (Mr. Olney, Sec. of State, to Mr. Peak, No. 54, Oct. 27, 1896, MS. Inst. Switz. III. 25.)

The subject was revived by Mr. Cramer's successor, Mr. Winchester, in his No. 54, April 26, 1886. (24 MS. Desp. Switz.) Mr. Winchester was authorized to renew negotiations, but only on the basis of previous instructions. (Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, No. 48, May 17, 1886, MS. Inst. Switzerland, II. 311.)

Mr. Winchester subsequently reported that he was unable to induce the federal council to consider the matter officially, owing to the opinion that the proposal would involve an amendment of the federal and cantonal constitutions on a subject concerning which the genius of the people was opposed to a change. (Mr. Winchester to Mr. Bayard, No. 131, May 27, 1887, 25 MS. Desp. Switzerland.)

Further negotiations did not take place. (Mr. Olney, Sec. of State, to Mr. Peak, min. to Switzerland, No. 54, Oct. 27, 1896, MS. Inst. Switzerland, III. 25.)

"It would seem very desirable, notwithstanding the abortiveness of the efforts made toward a naturalization treaty with Switzerland between 1882 and 1889, that a conventional arrangement should be perfected with the Confederation for the better determination of the status as well as the personal and property rights of citizens of the United States of Swiss origin. The Helvetian Republic appears to stand, by a somewhat notable anomaly, with the minority of modern states in holding to the now generally abandoned doctrine of perpetual allegiance, and the more remarkably so as its contention seems to rest, not on the old theory of the sovereign's absolute mastership over the subject, but on the individual's relation to the local commune, in which he is held to acquire a species of perpetual denization by descentance, inheritance, or even purchase, that can not be dissolved except with the consent of the commune. This pretension has been pushed so far that even native Americans, born of naturalized parents, may, it seems, be held to military duty should they visit Switzerland.

"The United States minister at Berne has been instructed to reopen negotiations in view of the more encouraging disposition to conclude a convention in this regard which was disclosed by a certain consultative report made to the Swiss Federal Council in 1888." (Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxxviii.)

"I have the honor to invite your excellency's attention to the subject of a naturalization convention between the United States and Switzerland. This subject has engaged the attention of the two Governments as far back as in 1884, at which time the Government of the United States urged the project of such a treaty upon the Swiss Government. On the 20th of February, 1885, the Swiss Government, in

response to this proposed treaty, replied that Swiss nationality depends upon citizenship of or in a Canton; that article 44 of the Swiss constitution forbids the Cantons to deprive a citizen of his citizenship, and the confederation also has no authority to do so, and that, consequently, the confederation lacks the competence by treaty to connect with the acquisition of citizenship in the United States the loss of citizenship in Switzerland. In view of this constitutional objection upon the part of Switzerland, the subject was no further pressed at that time.

“In May, 1888, the committee of the National Council in its report upon the acts of the Federal Council made reference to the repeated suggestions of the United States for a naturalization treaty, set out the objections theretofore made by the Federal Council, and added that the Federal Council had latterly felt well disposed to the project of such a treaty, and concluded with a recommendation that the Council enter into a consideration of the convention proposed.

“It is the purpose of this note to inquire of your excellency whether the Federal Council now has the competency to negotiate a naturalization convention with the United States, as suggested in the foregoing report, and whether the Swiss Government at present feels disposed to enter into consideration of such a convention.”

Mr. Peak, U. S. minister, to the President of the Swiss Confederation, Dec. 8, 1896, *For. Rel.* 1897, 559.

“In answer to the note of your excellency of December 8 last, submitting to us the project of a treaty between Switzerland and the United States on the subject of naturalization, we have the honor to inform you that to the conclusion of such a treaty as outlined in the above-mentioned project there is opposed to-day, as in 1885, the principle enunciated in Article 44 of the Federal Constitution.

“If the Government of the United States of America finds it strange (Report of the Secretary of State to the President for the year 1896, p. 28) that Switzerland clings to this principle, it is prayed to remember that it is for each state to regulate for itself the conditions under which one acquires or loses the right of citizenship within its boundaries, and that the practice followed in Switzerland has its foundation in the point of view and sentiment of the Swiss people, just as the principles of law in force in the United States, and differing from ours, spring, no doubt, from the particular character of the American people.

“Besides, it is not exact that a Swiss citizen can renounce his Swiss citizenship only with the consent of his commune. If the right of renunciation of Swiss citizenship is contested, the applicant, following the Federal law of July 3, 1896, can have recourse to the Federal tribunal, which, if the conditions mentioned in this law are

complied with, decides what is necessary to enforce his demand. Thus, even lately, the Federal tribunal has held that the fact of not having paid the military tax is not a valid reason for withholding the right to renounce citizenship."

The President of the Swiss Confederation to Mr. Peak, U. S. minister, Jan. 22, 1897, For. Rel. 1897, 560.

Sept. 29, 1896, Mr. Peak addressed to the President of the Swiss Confederation a note saying that Frederick W. Glardon, a native of the United States, temporarily residing in Geneva for the purposes of study—born of parents who had formerly resided in Fribourg, Switzerland, but who had emigrated to the United States and become naturalized citizens before his birth, which occurred Aug. 21, 1876—had been informed by the authorities of Geneva that he must either formally renounce his Swiss citizenship, or else perform military service. Mr. Glardon on Sept. 18, 1896, attempted to make the necessary renunciation, but the authorities refused to accept his passport as sufficient evidence of his American citizenship. Mr. Peak asked that Glardon's claims to American citizenship be recognized.

The Swiss Government replied Oct. 8, 1896, that, in accordance with article 7 of the law of July 3, 1876, Glardon was required to present in writing an application with proofs, and that these should state that the applicant was "no longer domiciled in Switzerland, and that he possesses a civil right in the country in which he resides. . . . If the right of renouncing nationality should be contested at this point, the cause should be carried before the Federal Tribunal, which decides in the last instance. The Federal Council has no jurisdiction in questions of this kind." (Mr. Peak, min. to Switzerland, to Mr. Olney, Sec. of State, No. 45, Oct. 12, 1896, 30 MS. Des. Switzerland.)

"It will be observed that the Swiss Government declines to consider a naturalization convention now, as in 1885, on the ground that such a convention would be opposed to article 44 of the Swiss constitution. This article as it appears in the constitution of 1848 reads as follows:

"ART. 44. No canton shall expel from its territory one of its own citizens or deprive him of his rights, whether acquired by birth or settlement."

"This was amended in 1874 by the following:

"Federal legislation shall fix the conditions upon which foreigners may be naturalized as well as those upon which a Swiss may give up his citizenship in order to obtain naturalization in a foreign country."

"The Federal Assembly in 1876, in accordance with this amendment, prescribed the process whereby one might lose or gain the right of Swiss citizenship. This law provides, among other things, that a Swiss citizen, in order to renounce his citizenship, must no longer have a domicile in Switzerland; that he must enjoy a civil capacity

under the laws of the country in which he resides and must have a citizenship in some foreign country already acquired or assured, for himself, his wife, and his minor children. The declaration of renunciation should be in writing, accompanied by proper proof, and presented to the cantonal government. The right of contest is limited to four weeks, and in case of contests the Federal Tribunal decides.

"It will be observed that the amendment to article 44 gives to Federal legislation the right to prescribe the conditions whereby one might lose his citizenship, and, therefore, it would seem to follow logically that such a prescription as the one sought to be embodied in the proposed treaty (that a Swiss acquiring American citizenship should be held to relinquish his Swiss citizenship) might properly fall within the authority of that body. But, as a matter of fact, whatever the words of the amendment may clearly mean, they have been so often and so forcibly interpreted so as to exclude from the Federal Council or Federal Assembly this power that those bodies do not dare, nor do they consider that they have the right, to oppose themselves to this idea. Thus it is that the declination of the Federal Council to enter into negotiations for a naturalization treaty with the United States must be attributed to a real lack of capacity and not to any wish on their part to oppose it.

"As presenting the Swiss point of view on this subject, I send herewith inclosed to the Department a translation of an interesting and instructive extract from the *Handbuch des schweizerischen Bundesstaatsrechts*, by Dr. J. J. Blumer, a work of noted authority. In this article the author has presented from the Swiss standpoint a clear and succinct view of the doctrine of perpetual allegiance and a history of the interesting discussions to which it has given rise.

"It will be observed that, however illogical and indefensible the doctrine may be, it is most profoundly embedded in the sentiment of the Swiss people. Citizenship is regarded by them not only as a sacred possession, but also as a valuable property right, entitling the citizen to demand of his commune or canton aid and assistance in case of poverty, or even a home and support in the event of old age and helplessness. It is, perhaps, this aspect of the case which appeals most strongly to Swiss patriotism and is responsible for the manifest repugnance of the Swiss citizen to renounce his citizenship, even after acquiring citizenship in another country. He reserves his Swiss citizenship as a valuable contingency for old age and helplessness, in the event he should not prosper in his adopted country. The doctrine is thoroughly understood and appreciated by all the people of Switzerland, even among the most ignorant peasants, and is taught in all their schools. Those who emigrate to the United States are not ignorant of its nature, but are unwilling to renounce their Swiss citizenship, and

hence when on their return to Switzerland they are required to perform the duties of citizenship they are not entitled to much sympathy, however desirous the Government of the United States may be to shield them.

"They have voluntarily placed themselves in the attitude of owing allegiance to two different sovereignties, and the burdens and inconveniences resulting therefrom would seem to be as essentially a part of this dual allegiance as the advantages which they hope to derive from it. As naturalized citizens of the United States they owe allegiance to our Government and are entitled to its protection; as native citizens of Switzerland they hold and claim the right to return to their commune and demand its aid and assistance in case of poverty or helplessness. As long as they remain in their Swiss jurisdiction Switzerland claims the right to exact of them military service and other duties of citizenship as an equivalent for the possible benefit they may receive from their commune in the event of decrepitude and helplessness.

"For harmonizing views so widely and radically different and so conflicting as those entertained by the two Governments upon this important subject, a naturalization convention would seem to be the wisest and best remedy, but I regret to say that I see nothing in the present attitude of the Swiss Federal Council or in the sentiment of the people to justify the hope of such consummation in the near future."

Mr. Peak, min. to Switzerland, to Mr. Olney, Sec. of State, Feb. 3, 1897, For. Rel. 1897, 557.

*Translation of an extract from the Handbuch des schweizerischen Bundesstaatsrechts, by Dr. J. J. Blumer, vol. 1, page 330.*

"The possession of the right of Swiss citizenship is derived from the right of citizenship cantonal, as this in turn is subordinated to the possession of the right of citizenship communal, or of a commune.

"It is therefore to the cantons that belongs the privilege of promulgating the regulations upon the loss or acquisition of citizenship, but inasmuch as contests between the cantons and even international conflicts may arise from this state of things, the constituted authorities believed, as early as in 1848, that it was necessary to insert in the constitution this principle: 'That no canton can deprive any of its citizens of the right of origin or of citizenship.' It was sought to avoid thus a return to the system of 'helmat losat,' or 'homeless people,' resulting formerly from the fact that certain cantons had withdrawn the right of citizenship or commune from their citizens who embraced another religion or contracted marriage with the professor of another faith, whereas other cantons had sought to prevent this by a vote of the assembly of cantons.

"At the diet in 1848 the deputation from Zurich proposed to make an exception to the principle above stated in the case where a Swiss should possess uncontested citizenship rights in a foreign country. It

was urged that if one continued to consider forever and in all circumstances the emigrants as citizens, the cantons and communes would have in time a population outside of its boundaries, without direct connection with their country, and who would not avail themselves of the right of citizenship except upon such occasions as it should be to their advantage. It was objected to the proposition of Zurich that the right of Swiss citizenship should be held so sacred that any proscription of it was absolutely inadmissible; that this notion of the value and importance of the right of Swiss citizenship was bound up and linked with the sentiments of the Swiss people; that a citizen of the confederation should not be allowed to lose his right of citizenship except upon his voluntary renunciation and proof that he had acquired another domicile. Following this discussion the proposition of Zurich was rejected by only two votes majority.

"During the discussion upon the revision of the constitution in 1871 and 1873, it was sought to add to article 42 of the ancient constitution a prohibition against the banishment of citizens of other Cantons from the territory of the Canton where they were. At the same time the National Commission proposed the following amendment: 'He who acquires or accepts the citizenship of a foreign country loses his citizenship, Swiss and cantonal.' This amendment was supported by arguments analogous to those which were urged in 1848 in favor of the proposition of Zurich. It was stated that the Swiss who were naturalized in America refused upon their return to Switzerland to fulfill their duties of Swiss citizenship when such was inconvenient to them, invoking their newly acquired citizenship; and, on the other hand, when they found themselves in need of it they reclaimed the aid and assistance of the Cantons and communes, pretending that, notwithstanding their American citizenship, they had not lost their rights of Swiss citizenship and still possessed all the privileges belonging to a citizen, both cantonal and communal. It was added that a position so equivocal and which could be easily modified provoked conflicts, and that it was, moreover, contrary to the spirit of the ancient country. But the National Council itself rejected this amendment, which had been opposed by such arguments as these: That in 1850 they had tried to remedy the inconveniences springing from the 'heimat losat,' and that now this proposition would open the door anew to the same disorder; that it was in contradiction of Swiss history and the development of its public rights; that it was opposed to the sentiments of the people, who held firm to the praiseworthy theory that one could never, except by his expressed will, lose his right of citizenship in Switzerland; that often it did not depend upon the free will of the citizen that he had acquired citizenship in a foreign country, but that in many countries he was directly compelled by circumstances to naturalize himself; that thus in a number of countries, and, indeed, in America, it was necessary to be naturalized before one could acquire the power to own land, and that in certain of the German States, where exists the system of concessions, citizenship was an indispensable condition to the exercise of certain professions. It was recognized that this double right of citizenship could give rise to conflicts, particularly where the jurisdiction of tribunals was concerned; but these inconveniences, it was urged, were not so great that it should be necessary to discredit a theory widely up-

held and deeply imbedded in the hearts of the Swiss people, and especially was this true when the acquisition of foreign citizenship had never as yet occasioned to Switzerland any grave difficulties with other countries.

The principle that a Swiss can not lose his Swiss citizenship except he himself renounce it, has been thus maintained since the last revision. But as the legislation of the Cantons presented great divergencies as to this renunciation, and as the right of renunciation, even, was placed in doubt by certain Cantons, it was declared in the project of the constitution of 1872 that this matter was to be submitted to Federal legislation. And this amendment was passed without change in the present constitution, of which article 44, or that part of it which concerns the present question, reads thus: 'No Canton can . . . deprive one of its citizens of the right of citizenship.' 'Federal legislation will determine the conditions under which a Swiss can renounce his nationality to obtain naturalization in a foreign country.'

"The Federal Council has fully explained the signification of the above in many notes addressed to foreign governments. It can be summed up as follows: The right of Swiss citizenship can not be proscribed; every Swiss conserves his citizenship as long as he does not renounce it himself and as long as he can prove his descent; the fact of his having acquired a foreign citizenship is not sufficient to make him lose his Swiss citizenship; he preserves it even during a prolonged sojourn in a foreign country, and even when he has not paid his military and civic taxes in Switzerland; this is also true if he has accepted military service or entered into the administration of the foreign country; to lose his Swiss citizenship a formal and express renunciation is necessary, which also extends in its effect, to his minor children; but in order to make such a renunciation valuable or valid, it is necessary to prove that he has acquired domicile in another country or Canton.

"From all that precedes it follows that the Swiss laws admit the principle of double citizenship, which is prohibited in many countries. Thus, in 1851, when the government of Outer Appenzell Rhodes claimed the authority to withdraw the right of citizenship from one of its citizens who wished to acquire citizenship in another Canton, the Federal Council instructed it that this point of view was contrary to the constitution, and that it would be obliged to admit as established the right of recourse of a citizen of Appenzell who complained against such a withdrawal of his citizenship. The Federal Council has also refused to ratify an article of the constitution of Uri, in 1850, whereby it was sought to exclude citizens who, after having acquired citizenship in a foreign country, had not renewed his Swiss citizenship within a certain time. The same decision was made in an analogous case concerning the constitution of St. Gall. In this sense, that the Federal Assembly reserved the right of interpreting article 43 (present article 44).

"In conclusion, it should be mentioned that the Federal Council has declared inadmissible an ordinance of the Canton of Nidwalden prescribing that the widows of its citizens, originally of the Canton of Obwalden, should be returned to the charge of their original commune. In a word, the acquisition of the right to aid or assistance is a consequence of the right of citizenship, which, under the terms of article 44, can not be lost." (For. Rel. 1897, 560.)

## (17) TURKEY.

## (a) LAW OF 1869.

## § 459.

"His excellency [the Turkish minister of foreign affairs] states that the majority of cases where the naturalization of Turkish subjects is questioned are found to be people who have left the Empire to escape payment of debts, evade criminal process, or without obtaining leave of the Government, and by remaining absent for a length of time and returning under the protection of an American passport expect immunity from everything remaining of record against them. Furthermore, he says that the Ottoman Government can have but one standard for the consideration of the naturalization of persons formerly Ottoman subjects, and which is fully stated in the law promulgated January 19, 1869.

"By examination of the *Législation Ottomane*, vol. 1, page 8, art. 5, I translate as follows:

"ART. 5. The Ottoman subject who has acquired a foreign nationality with the authorization of the Imperial Government is considered and treated as a foreign subject. If, on the contrary, he has naturalized himself as a foreigner without the preliminary authorization of the Imperial Government, his naturalization will be considered as null and void, and he will continue to be considered and treated in all respects as an Ottoman subject. No Ottoman subject can in any case acquire foreign naturalization until after obtaining an act of authorization delivered by virtue of an Imperial *iradé*.

"His excellency stated that but one thing remained to be done by those who have violated the above law, and that was to file a petition stating all the points of their several cases, and particularly a cause for changing their nationality, with the Turkish minister in America, who in turn will forward the same to the locality whence the petition originally came, and if found to have left a clean record after him, there will be no difficulty in obtaining the Imperial *iradé*, considered so indispensable in the above law.

"Without this last precaution all naturalized Turks are debarred from inheriting from Ottoman subjects, notwithstanding that the property may have been acquired through the thrift and industry of the foreigner. And in case the latter purchases property he cannot bequeath the same to other than an Ottoman.

"In reference to filing these petitions with the Turkish minister in America, I made particular inquiry whether it would not be preferable to have the same come through the channel of the State Department and this legation, to which his excellency replied that by the personal application to the minister he would be enabled to pronounce at once whether the applicant could obtain relief, and thereby save much time and labor."



Mr. Emmet, chargé at Constantinople, to Mr. Bayard, Sec. of State, July 21, 1885, For. Rel. 1885, 851-852.

For the text of the Ottoman Law of Nationality of Jan. 19, 1869, and a circular of the Turkish Government of March 26, 1869, in relation thereto, see For. Rel. 1893, 714-715.

"Turkey refuses to legalize the passports of any naturalized person of Armenian birth. There is no way by which this Department can procure a visé in such cases. The Turkish minister uniformly refers all applications for visés to the Ottoman consuls," who are prohibited by their Government from viséing the passports in question.

Mr. Uhl, Act. Sec. of State, to Mr. Agnew, May 3, 1895, 202 MS. Dom. Let. 49.

(b) BUREAU OF NATIONALITY.

§ 460.

The Turkish bureau of nationality was established under a law of July 17, 1869. (Legislation Ottomane, I. 12.) It was ordained for the purpose of examining documents presented in support of the claims of persons residing in Turkey to foreign nationality, and, if such claims are found to be satisfactory, a certificate to that effect is issued by the bureau and the person's name is registered. Such registration avoids further discussion of the claimant's nationality. If the evidence of foreign nationality is not satisfactory, the certificate and registration are refused, and the bureau reports the case to the minister of foreign affairs, with whom rests the final decision. The bureau deems as American citizens Ottoman subjects who were naturalized in the United States before 1869. Registration has not been regarded as obligatory upon aliens, but it is required whenever the alien presents himself before an Ottoman tribunal either as claimant or defendant, or wishes to validate any official or legal document, or is a party to a transaction in which the seal of an Ottoman office is necessary.

Mr. Cox, min. to Turkey, to Mr. Bayard, Sec. of State, Jan. 5, 1886, enclosing a translation of the regulation of July 17, 1869. For. Rel. 1886, 862.

See Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, No. 79, Jan. 23, 1886, 4 MS. Inst. Turkey, 375.

(c) DIPLOMATIC CONTROVERSIES.

§ 461.

"This Department has received a dispatch of the 20th ultimo, from the United States consul at Beirut, stating that the Turkish bureau of nationality at Constantinople had recently declined to certify to the American citizenship of Messrs. Kevork Guligyan and Bedros Iski-

yan, on the ground that their passports did not show that they left the Ottoman Empire prior to the promulgation of the law of 1869 forbidding Turkish subjects to leave the country without permission to become naturalized in another country. The refusal referred to, for the reason alleged, seems so extraordinary, at least, that you will protest against it, and endeavor to have it corrected so far as it may have been or may be applied to the persons above referred to.

“Passports are issued by this Department to naturalized citizens upon the production of the certificate of naturalization. There is no law of the United States requiring a passport to state when a naturalized citizen left the country of his birth, or to embody that statement in the passport. It has not been the practice of this Department to insert such a statement in the passports issued to former Turkish subjects or to any other naturalized citizens. A different course might imply that the right of the foreign government to participate in or to make the naturalization of its subjects conditional was acknowledged here. This it has never been and probably never will be.”

Mr. Bayard, Sec. of State, to Mr. Emmet, chargé at Constantinople, May 29, 1885, For. Rel. 1885, 847.

See, as to the similar case of Mr. Chryssofondis, For. Rel. 1885, 849, 852, 855.

“The Imperial ministry has received the dispatch that the legation of the United States of America was pleased to address to it, dated the 15th of July last, No. 251, relative to the naturalization of Kevork Guligyan and Bedros Iskiyan.

“The competent bureau of my department, after having taken cognizance of this document, remarks that the claims of the persons in question could not be admitted, inasmuch as they have exhibited no document in support of them except a simple passport. Now, such a document is not of itself sufficient to give a native Ottoman subject a foreign nationality.

“The examination of the certificate of naturalization delivered by the foreign government is indispensable. In fact, it is important to establish under what condition the naturalization has been acquired, for no naturalization obtained without the authorization of the Imperial Government is valid unless it took place in legal form before the promulgation of the law on Ottoman nationality, and any naturalization subsequent to this law is considered as being null, if the formalities prescribed in article 5 are not fulfilled.

“This is, in a general way, the line of proceeding followed for the verification of nationalities, and the competent bureau cannot depart from it in the special case of the two aforementioned persons.”

Said Pasha, Turkish min. of for. aff., to Mr. Cox, Am. min., Oct. 15, 1885, For. Rel. 1885, 876, accompanying despatch of Mr. Cox to Mr. Bayard, No. 35, Oct. 24, 1885, For. Rel. 1885, 873.

"I have received your No. 35, of the 24th ultimo, having especial reference to the cases of the naturalized American citizens, Kevork Guligyan and Bedros Iskiyan, whose registration in the Turkish bureau of nationality is refused on the sole evidence of their passports, and embracing general considerations on the subject of the right of expatriation. . . .

"It would appear from your remarks that these two persons seek registration as foreigners, in order to be qualified to hold real estate as such. . . . If Turkish law imposes a disability as to the tenure of real property upon a Turk who has become naturalized elsewhere without the previous consent of his Government, then the question would be one of the subjection to municipal regulations of those who have voluntarily placed themselves thereunder, in a matter over which those regulations have sovereign and exclusive control. And the Turkish Government having the right to investigate the cases of persons applying, as foreigners, for the privilege of holding lands, or for any other personal privilege over which municipal laws have control, it would seem to have the right to demand of them such evidence as would enable it to ascertain whether the applicants labor under any disqualification, and, in the event of their refusal to produce such evidence, to withhold the privilege sought. . . .

"If, therefore, registration in the bureau of nationality were sought by the two men in question merely as a formality whereby to qualify themselves for municipal rights, this Government could not object to the application in their case of any reasonable test or mode of trial to ascertain whether any legal disability existed to prevent the concession of the privilege sought.

"I am not sure, however, that the matter is capable of consideration within these narrow limits. It seems to trench upon the broad question of the right of expatriation, and to involve application to any and all Turks who, being naturalized in the United States, may return to Turkey. . . .

"This Government has never admitted, and can not now admit, the doctrine for which the Porte contends. Within our domestic jurisdiction we are bound to uphold and enforce the right of expatriation, and our assertion of that right follows to every foreign country the alien who has become a citizen of the United States by due process of law, and regards him as the equal of a native-born American citizen. We may not abandon the assertion of that right in favor of the counter assertion of the Government of such a person's original allegiance.

"The laws of the United States thus inhibiting absolutely any discrimination between their native-born and naturalized citizens, the same form of passport is prescribed for all alike, and, under international law, is to be accepted everywhere as *prima facie* evidence of nationality. Our duty is limited to the positive one of lawfully certi-

fyng the fact of American citizenship, and this Government cannot be expected to go beyond the bounds of its powers and duty by assenting to such a contention on the part of a foreign government as would, if logically carried out, involve the negative obligation to show that the citizen had not at some previous time been subject to another power.

"I am aware of no government whose contention in this regard appears to go as far as that of Turkey. Other sovereign states, it is true, deny the right of expatriation without prior consent, but none, to my knowledge, imposes upon every alien resorting to its territory the burden of disproof.

"The contention of Turkey may in fact be found to go even further, and assert a power on the part of the Porte to forbid the government of the state whose citizenship a Turk may have lawfully acquired from diplomatic intervention in his behalf, if the Turkish law declares him to be still a subject of the Porte. I do not know that this is so; I trust it is not. There may be an analogy, however, between the Turkish rule of registration and the Mexican law of matriculation. In Mexico, all foreigners are required to deposit their passports in the ministry of state at the capital and take out a certificate of matriculation, which is alone admitted as evidence of their rights as foreigners in that country. Failing such registry, they can assert no civil or judicial rights of alienage; and the law even proclaims that no diplomatic intervention of their government will be admitted in their behalf under whatever circumstances. The United States have for years contested this position, asserting that no municipal statute of another country can overthrow the reciprocal relations of a foreigner with his own government, or impair the obligation of the latter to intervene for his protection in case of wrong or denial of justice.

"But, extreme as is the Mexican position, it merely rests on the execution of a formality. It accepts the passport as the evidence of alienage, and simply substitutes, for municipal effects, one form of indiscriminating certifications for another.

"The Turkish rule, on the contrary, rests on a vital discrimination between classes of foreigners; it imposes a burden of proof unknown elsewhere, and it assumes not merely to treat certain persons as Turks until the contrary is shown, but to make them Turks.

"The question is, in its broadest aspect, one of conflict between the laws of sovereign equals. The authority of each is paramount within its own jurisdiction. We recognize expatriation as an individual right. Turkey, almost solely among nations, holds to the generally abandoned doctrine of perpetual allegiance. Turkey can no more expect us to renounce our fundamental doctrine in respect of our citizens within her territory than she could expect to enforce her doc-

trines within the United States by preventing the naturalization here of a Turk who emigrates without the authorization of an imperial *iradé*.

"In such cases, where the disagreement is fundamental, a conventional arrangement is practically the only solution to the difficulty. Founding on the volition of the individual as an ultimate test, the United States, without impairing their doctrine of the inherent right of expatriation, but rather confirming it, may agree upon certain conditions, according to which a person who has been naturalized in the United States and returns voluntarily to the country of his original allegiance, there to remain for a stated period, may be held to have created a presumptive intent to resume his former status, and thereby abandon his acquired nationality. We recognize the individual right to do so; repatriation is as equally a right as expatriation."

Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Nov. 28, 1885, For. Rel. 1885, 885.

Much space was given, in the foregoing instruction, as will appear by the full text in the volume of Foreign Relations, to a conjectural discussion of questions that it was supposed might arise in regard to the functions of the Turkish Bureau of Nationality. It was found, however, that the bureau did not possess independent judicial functions, but that the ultimate decision rested with the executive, so that it became unnecessary to pursue the conjectural discussion further. (Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Jan. 23, 1886, 4 MS. Inst. Turkey, 375.)

"Questions concerning our citizens in Turkey may be affected by the Porte's non-acquiescence in the right of expatriation and by the imposition of religious tests as a condition of residence, in which this Government cannot concur. The United States must hold, in their intercourse with every power, that the status of their citizens is to be respected and equal civil privileges accorded to them without regard to creed, and affected by no considerations save those growing out of domiciliary return to the land of original allegiance, or of unfulfilled personal obligations which may survive, under municipal laws, after such voluntary return." (President Cleveland, annual message, Dec. 8, 1885, For. Rel. 1885, xiv.)

As to the refusal of the Turkish Government to recognize the American citizenship of George Melmar, see For. Rel. 1889, 718, 722.

"I have the honor to refer you to Secretary Bayard's instruction No. 30, of July 26, 1887, in reply to Mr. King's dispatch No. 323, of May 14, 1887, setting forth a number of cases of disputed nationality." (Mr. Straus, min. to Turkey, to Mr. Blaine, Sec. of State, No. 195, May 18, 1889, For. Rel. 1889, 718, 719.)

"It appears from a report of the prefecture of police that a certain number of Ottoman subjects, inhabitants of Asiatic Turkey, betake them furtively to America, and after remaining there for some time, return to their country provided with American passports, and claiming to pass as citizens of the Republic.

"As, according to the Ottoman law on nationalities, Ottomans have not the right to acquire foreign naturalization without having first obtained the authorization of His Imperial Majesty the Sultan, the Sublime

Porte is unable to admit illegal changes of this nature, and begs the United States legation to kindly send instructions to its consuls and agents in the Empire that they may not eventually give their protection to this category of individuals—natives of the country—in order to prevent difficulties with the Imperial authorities." (Said Pasha, Turkish min. of for. aff., to Mr. Hirsch, Am. min., Jan. 9, 1892, For. Rel. 1892, 533.)

"In reply this legation begs to point out that five years' continuous residence in the United States, and the fulfillment of certain conditions prescribed by law, entitle a foreigner to admission to citizenship, if he may so desire, and to all the rights and privileges of an American citizen, among which is the right of travel, either for business or pleasure. Anyone in the Empire duly in possession of an American passport is entitled to the protection of the United States Government. This legation, in consequence, finds itself unable to comply with the request contained in the aforesaid *verbal* note that orders be issued to the United States consuls in the Empire to refuse protection to those naturalized American citizens, and permits itself to hope that instructions may be given to the minister of police that shall insure the respect due to every American passport presented." (Mr. Hirsch to Said Pasha, Jan. 22, 1892, For. Rel. 1892, 534.)

"It is understood that by the laws of Turkey an Ottoman subject can not divest himself of that character without the express sanction of the Imperial Government. If without such authority he accepts a foreign naturalization, it is regarded as of no effect both in reference to himself and his children.

"It is further provided that every person who obtains naturalization abroad or enters a foreign military service without the permission of the Sultan may be declared to have forfeited his Ottoman character, and in that case is altogether interdicted from returning to the Ottoman Empire.

"The legation of the United States at Constantinople is frequently called upon to intervene in behalf of returning naturalized citizens of Turkish origin as to whose allegiance conflicting claims exist under the laws of the two countries. Where circumstances place a person under dual obligations in the state of origin and in the state of adoption, it is not always practicable to cause the laws of one country in respect to citizenship to be recognized and applied in another country when they conflict with the laws thereof, and when the individual has voluntarily placed himself within the jurisdiction of the latter."

Mr. Gresham, Sec. of State, to Mr. McLean, Aug. 8, 1893, For. Rel. 1893, 666.

See, to the same effect, Mr. Gresham, Sec. of State, to Mr. Gabriel, July 18, 1893; Mr. Adee, Act. Sec. of State, to Mr. Gabriel, July 25, 1893: 192 MS. Dom. Let. 624, 681.

"The rules governing naturalized subjects of the leading European powers who have been natives of Turkey, after their return to the

Ottoman Empire, are more frequently found in instructions to diplomats resident here than in statutory enactments. . . .

"Germany naturalizes and protects in third countries; but, in 1883, instructed its consuls not to extend protection to those who were natives of the Ottoman Empire when they return to Turkey.

"Italy instructs her diplomatic agents not to afford protection to her naturalized subjects who were natives of Turkey. She conforms substantially to the German rule.

"England, under an act of Parliament, writes on the face of every passport that protection will be afforded its bearer in all countries except the country of his origin, if he left it without the consent of its sovereign.

"Russia, like England, never protects a returning native of the Ottoman Empire who left it without an imperial iradé. This rule does not apply to the natives of that portion of Asia Minor bordering the Black Sea and extending to the interior; that she acquired in her last war; and, whether Turks or Armenians, those natives became Russians by conquest and treaty, and are protected as native Russians when in a foreign land.

"France never naturalizes a native of the Ottoman Empire born of Ottoman parents unless he produces an imperial iradé or authorization, and will not protect him should he return to Turkey.

"Austria does not naturalize a Turk who owns real estate in Turkey; she naturalizes others, and extends her protection in all countries except Turkey.

"Belgium and Holland naturalize on the consent of the country or sovereign of the country of origin.

"I have not sought to ascertain the rule prevailing in the legations of Spain and Sweden, deeming it of small importance, but will do so if you desire.

"It will thus be seen how little our doctrine of the right of voluntary expatriation is recognized by the rest of the civilized world in their dealing with Turkey.

"In my last interview with the grand vizier he said, with earnestness, that Turkey would never consent that her subjects could change their nationality without the Sultan's consent. He added: 'If war is ever made on us for this we could not help it, and would defend as best we could.' . . .

"For about thirty years the questions of naturalization and of jurisdiction under article 4 of the treaty of 1830 have been subjects of contention. As often as there seemed to be the prospect of a new treaty, a change of administration, of a grand vizier, of a foreign minister of Turkey, or of a minister from the United States, compelled negotiations to begin *de novo* and no progress was made.

"It is safe to assume that no new treaty can be made on either of the subjects of disagreement referred to which does not embrace both.

"The anxiety at the Porte to have you adopt such a construction of article 4 of the treaty of 1830 as will conform to rule applied to subjects of European powers who are charged with crime, and will confer the jurisdiction on their own courts, will, when you can make some concessions, tend greatly to help forward a treaty of naturalization."

Mr. Terrell, min. to Turkey, to Mr. Gresham, Sec. of State, Sept. 17, 1894, For. Rel. 1894, 763.

Mr. Gresham, replying, Oct. 20, 1894, cited Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Nov. 23, 1885, For. Rel. 1885, 885; *supra*, and said: "The Government of the United States and the American people are too firmly committed to the principle of the right of expatriation to be willing to abandon it in our negotiations with the Ottoman Empire." (For. Rel. 1894, 764.)

"This Department can make no distinction between Syrians and Armenians in treating with the Turkish Government any questions arising concerning them. All that it can do is to endeavor to secure full rights under treaty and capitulation for every American citizen, regardless of his origin. In this respect the United States stand quite alone, as England and the continental states do not claim for a naturalized alien the immunities of his acquired nationality when he returns to the country of which he was previously a subject unless by law or treaty the latter recognizes his change of allegiance." (Mr. Olney, Sec. of State, to Mr. Diaf, Oct. 10, 1896, 213 MS. Dow. Let. 201.)

"The law of Turkey, like that of Russia and some other countries, does not recognize unpermitted change of allegiance by a Turkish subject; but, although no treaty of naturalization exists between the United States and Turkey in regulation of this point, no instance has yet been pressed by the Turkish Government in assertion of a right to treat the individual as a Turkish subject or to punish him for the alleged offense of becoming a citizen of a foreign state without permission."

Report of Mr. Olney, Sec. of State, to the President, Jan. 22, 1896, S. Doc. 83, 54 Cong. 1 sess.; For. Rel. 1895, II. 1471.

In the preceding part of the report it is stated that the Turkish Government had pursued the course of expelling or excluding the class of persons in question.

Responding to a petition that the American minister at Constantinople be instructed "to propose and urge by every proper diplomatic method a concession of the right of expatriation for Turkish subjects, with protection while in transit to the borders of the Turkish Empire," Mr. Olney said: "This Government recognizes the right of expatriation, and has always been energetic in its efforts to protect American citizens whether of Turkish or other origin. It has no



international right, however, to intervene in behalf of those who are not its citizens, or to interfere with the enforcement of laws for the government of their own subjects by foreign countries."

Mr. Olney, Sec. of State, to Mr. Draper, March 12, 1896, 208 MS. Dom. Let. 457.

See, as to the case of Mrs. Papazian, Mr. Olney, Sec. of State, to Messrs. Foster's Sons, Nov. 14, 1896, 214 MS. Dom. Let. 21.

The Turkish minister stated, in a note of October 20, 1898, that, according to a determination reached by his Government six years before, Ottoman subjects were not authorized to change their nationality of origin except on engaging not to return to the Empire, and that, as persons of the class in question, notwithstanding this engagement, returned with foreign passports and asserted their alien quality, which, in view of the decision of the council of state that Ottoman subjects naturalized as foreigners must, on their return, be considered and treated as Ottoman subjects, gave rise to all sorts of difficulties, the Turkish consuls had been instructed not to visé their passports. The minister, therefore, requested that the necessary steps be taken by the United States to avoid the difficulties mentioned.

The Department of State replied that, as the naturalization laws of the United States made no special provision in regard to the subjects of a country which forbade their expatriation without the consent of their sovereign, the courts, to which the exclusive power of naturalization was committed, could not require of an applicant for citizenship proof that his government had given him permission to change his allegiance; that the Executive, on the other hand, could not apply to the granting of a passport a condition not legally requisite for the acquisition of citizenship; and consequently that it did not appear what steps could be taken to avoid possible controversy with regard to the application of the imperial rule.

Ferrouh Bey, Turkish min., to Mr. Hay, Sec. of State, Oct. 20, 1898; Mr. Hay to Ferrouh Bey, Oct. 24, 1898: For. Rel. 1898, 1108, 1109.

See, as to the general question, Mr. Day, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 13, 1898, MS. Inst. Turkey, VII. 274.

"In the Turkish Empire the situation of our citizens remains unsatisfactory. Our efforts during nearly forty years to bring about a convention of naturalization seem to be on the brink of final failure through the announced policy of the Ottoman Porte to refuse recognition of the alien status of native Turkish subjects naturalized abroad since 1869. Our statutes do not allow this Government to admit any distinction between the treatment of native and naturalized Americans abroad, so that ceaseless controversy arises in cases where persons owing in the eye of international law a dual allegiance are prevented from entering Turkey or are expelled after entrance. Our

law in this regard contrasts with that of the European states. The British act, for instance, does not claim effect for the naturalization of an alien in the event of his return to his native country, unless the change be recognized by the law of that country or stipulated by treaty between it and the naturalizing state."

President McKinley, annual message, Dec. 5, 1899. (For. Rel. 1899, xxxl.)

"I have to acknowledge the receipt of your letter of the 9th instant, calling attention to a newspaper publication of the 8th instant purporting to give a reportorial interview with Minister Straus, upon his return from Turkey, to the effect that United States citizens may now travel in Turkey, as the interdiction against this, caused by the Armenian troubles, was removed eight months ago. In view of this you ask whether you would be protected by this Government if you, being a naturalized Armenian, should revisit your old home in Armenia.

"Mr. Straus's statement was here understood to relate only to the removal of the inhibition of the travel of American citizens, missionaries, and others of non-Turkish origin in Armenia during the late disturbances in that quarter, and this understanding is confirmed by Mr. Straus himself, who is now in Washington. As to our naturalized citizens of Armenian or other Ottoman origin, the situation remains the same, in the absence of a treaty of naturalization between the two countries, the Turkish Government refusing to recognize the naturalization of a Turkish subject naturalized abroad without imperial consent since the promulgation of the Ottoman law of citizenship in 1869. The United States controverts this position, but unavailingly. In international law the status of such persons comes under the doctrines of dual allegiance, each Government claiming and exacting the allegiance of its naturals within its own jurisdiction and each being incapable of enforcing its own municipal law of citizenship within the jurisdiction of the other. Such conflicts have been adjusted in many instances by conventions between the United States and foreign powers, with the result of a mutual recognition of the validity of the naturalization of a citizen or subject of the one country within the jurisdiction and according to the domestic law of the other; but the conclusion of such a convention with the Ottoman Empire appears to be remote. As the consent of the Ottoman Government to the expatriation of a subject by naturalization in another country is only given upon the alternative condition that the applicant for release from Turkish allegiance shall either stipulate never to return or agree that in the event of return he will regard himself as an Ottoman subject, it follows that the case of per-

mitted naturalization seldom occurs, and that when it does occur it is attended with features which prevent this Government from using a free hand in dealing with a question growing out of the return of such a naturalized citizen to Turkish jurisdiction.

"While the Department and its diplomatic and consular agents in the Turkish dominions will use every effort now as always to protect any naturalized citizen of Turkish origin who returns to Turkey, it can not foresee that he will be permitted to enter the Empire, or that having entered he will escape molestation or expulsion."

Mr. Hay, Sec. of State, to Mr. Garabedian, Feb. 19, 1900, For. Rel. 1900, 938.

With reference to Mr. Hay's statement, which is similar to that made in President McKinley's message of Dec. 5, 1899, *supra*, that Turkish subject, naturalized in the United States, owe, under "international law," a "dual allegiance," it is to be observed that, according to the doctrines of expatriation, as embodied in the act of 1868, naturalization invests the individual with a new and single allegiance, absolving him from the obligations of the old. It is true that many publicists say that a dual allegiance results, but they obviously do not accept the theory of the act of 1868. That naturalization merely adds a new allegiance to the old is the position of those who deny the claim of voluntary expatriation. See Moore, *American Diplomacy*, 169-171, 191-192.

A copy of the letter to Mr. Garabedian was inclosed by Mr. Hay, Feb. 19, 1900, to the legation at Constantinople for its information, together with a memorandum made by Mr. Straus, at Washington, Feb. 16, 1900, which was, in part, as follows:

"In view of the fact that we have no treaty of naturalization with Turkey—and the fact that in 1869 a law was promulgated denying the right of Ottoman subjects to acquire foreign naturalization without the previous written consent of the Sultan—such Ottoman subjects of origin who in violation of this law have acquired foreign nationality, their acquired citizenship, upon their return to Ottoman territory, is not recognized, and it is not advisable, especially for Armenians, who are mostly regarded as suspects on returning from foreign countries to Turkey, to come under Ottoman jurisdiction. Each returning subject of origin raises the question of the conflict of sovereignty, with the advantages in favor of the Turkish Government while its subject of origin is within Ottoman jurisdiction.

"This question seldom arises in respect to other powers, as they either will not protect naturalized citizens on their return to Turkey, their country of origin, or they refuse to naturalize them except upon producing the written consent of Ottoman authorities. As that consent is only given upon the applicant stipulating either not to return or in the event of his return he agrees to regard himself as a Turkish subject, it follows that the question seldom arises.

"Pending the absence of a treaty of naturalization, Turkish subjects of origin will come under the disadvantage caused by the conflict of sovereignty."

To the same effect as Mr. Hay's letter of Feb. 19, 1900, see Mr. Hay, Sec. of State, to Mr. Garabedian, Dec. 9, 1899, 241 MS. Dom. Let. 484; Mr. Hill, Act. Sec. of State, to Mr. Rustum, May 25, 1900, 245

MS. Dom. Let. 285; Mr. Hill, Assist. Sec. of State, to Mr. Kourl, July 12, 1900, 246 id. 370; Mr. Hill, Act. Sec. of State, to Mr. Lodge, Jan. 12, 1901, 250 id. 200; Mr. Hay, Sec. of State, to Mr. Beveridge, Jan. 16, 1901, id. 238; Mr. Adee, Second Assist. Sec. of State, to Mr. Papazian, Jan. 28, 1901, id. 426.

"The information given below is believed to be correct, yet it is not to be considered as official, as it relates to the laws and regulations of a foreign country.

"The Turkish Government denies the right of a Turk to become a citizen of any other country without the authority of the Turkish Government. His naturalization is therefore regarded by Turkey as void with reference to himself and his children, and he is forbidden to return to Turkey.

"The consent of the Turkish Government to the naturalization in another country of a former Turk is given only upon condition that the applicant shall stipulate either never to return, or, returning, to regard himself as a Turkish subject. Therefore, if a naturalized American citizen of Turkish origin returns to Turkey he may expect arrest and imprisonment or expulsion.

"Jews are prohibited from colonizing in Turkish dominions."

Circular Notice, Department of State, Washington, Jan. 22, 1901, For Rel. 1901, 515.

As to the visé of passports of Jews going to Palestine, see Mr. Hill, Act. Sec. of State, to the Turkish min., Jan. 7, 1899, MS. Notes to Turkish Leg., II. 165.

(d) PENALTIES AND PETITIONS.

§ 462.

"I herewith inclose copies of letters from Mr. J. J. Arakelyan, of Boston, of the 16th and 29th ultimo, complaining that the Government of Turkey imposes taxes upon and exacts onerous duties of his relatives in the town of Arabkir, owing to his absence.

"Upon the receipt of Mr. Arakelyan's letter of the 16th, he was told that before any measures could be taken in the premises he must furnish proof of his naturalization. His letter of the 29th, therefore, inclosed a certified copy of such papers.

"Taxation may no doubt be imposed, in conformity with the law of nations, by a sovereign on the property within his jurisdiction of a person who is domiciled in and owes allegiance to a foreign country. It is otherwise, however, as to a tax imposed, not on such property, but on the person of the party taxed when elsewhere domiciled and elsewhere a citizen. Such a decree is internationally void, and an attempt to execute it by penalties on the relatives of the party taxed gives the person as taxed a right to appeal for diplomatic intervention to the Government to which he owes allegiance. To

sustain such a claim it is not necessary that the penalties should have been imposed originally and expressly on the person so excepted from jurisdiction. It is enough if it appears that the tax was levied in such a way as to reach him through his relatives.

"It is desired, therefore, that you bring the complaint of Mr. Arakelyan, as cited in the inclosed copies of his letters, to the notice of the Ottoman Government, requesting that the sum received for any taxes imposed on his relatives on his account be refunded, that the value of the road services rendered by Mr. Arakelyan's brother be returned, and that no further taxes on account of Mr. Arakelyan be imposed on his family."

Mr. Porter, Act. Sec. of State, to Mr. Emmet, chargé at Constantinople, No. 293, June 8, 1885, For. Rel. 1885, 848.

"I have the honor to report that during an interview had with the minister of foreign affairs, on the 20th inst., the particulars of dispatch No. 293 were fully discussed, with the following result:

"His excellency presupposes that at the time Mr. J. J. Arakelyan left his native town, Arabkir, some of his relatives entered into bonds, thereby enabling him to absent himself from home, and hence the exaction of taxes and labor on his behalf since his departure.

"If Mr. Arakelyan will take the trouble to file a petition with the Turkish minister in America, setting forth the facts of his case, his reason for becoming naturalized, and exhibiting the proofs of his naturalization, the minister will forward a communication to the authorities of his former home, and have his name stricken from the records, thus relieving his parents from the burden of further taxation or labor on his account. As to the restitution of moneys already disbursed, or remuneration for labor performed, his excellency said there would be no hope for recovery. In his own words, 'We will forgive him for the future, and he must forgive the Turkish Government for the past.'

"The system of bonding would-be absentees is quite a general practice in Turkey, and will undoubtedly be found the origin of the above case."

Mr. Emmet, chargé at Constantinople, to Mr. Bayard, Sec. of State, No. 516, July 23, 1885, For. Rel. 1885, 854.

A Turk who has, since 1869, been naturalized abroad without having obtained an Imperial iradé consenting to his expatriation, is debarred from inheriting from Ottoman subjects, notwithstanding that the property may have been acquired through his thrift and industry; and, in case he purchases property in Turkey, he can bequeath it only to such subjects. As to the restitution of moneys already disbursed or remuneration for labor performed, the Turkish minis-

ter of foreign affairs stated that there was no possibility of recovery on those accounts.

Mr. Bayard, Sec. of State, to Mr. Arakelyan, Aug. 17, 1885, 156 MS. Dom. Let. 554, citing dispatch from Mr. Emmet, chargé at Constantinople, No. 516, July 23, 1885.

"The facts, in brief, of my coming to the United States, and becoming one of its citizens, are as follows: When I was a boy, and my father was residing at Erzeroom, away from his family, he sent for me to join him there, leaving Arabkir, where I was born. While I was at Erzeroom my father's business compelled him to go to Treblzond, leaving me alone for two years, in which time a few of my friends, with myself, became desirous to go to the United States. Accordingly, in 1866, five of us left Erzeroom for this country, but when we reached Treblzond, where my father still was, he at once objected to my plan, and my companions continued their journey without me. At length my father, seeing that I should never be satisfied till I reached America, embraced the opportunity to let me go in the spring of 1867 with an American family, Mr. M. P. Parmelee and family, who were at Treblzond as missionaries of the American Board of Commissioners for Foreign Missions.

"On reaching Constantinople we met a Mrs. Walker, whose husband had died at Diarbekir, and she had come to Constantinople with her children to join other missionaries in returning to this country. I was then engaged to assist her in the care of her family from Constantinople to Boston, where we arrived July 15, 1867, going at once to her father's home at Auburndale, Mass., where I remained, studying, about one year. From there I went to Riverside Press, Cambridge, Mass., Messrs. H. O. Houghton & Co., proprietors, with the intention of learning the art of printing, and returning to Turkey.

"But as time went on my plans changed. On the 4th of June, 1879, I married an American lady at her home in Lancaster, Mass. In February, 1883, I left the Riverside Press, and opened a book and newspaper printing office at 226 Franklin street, Boston, where I still continue in business, residing at Cambridgeport, Mass., where I have been naturalized, as you already know, having in your possession a certified copy of my naturalization paper.

"Please observe, in view of the above facts, that there have been no obstacles to my coming to this country besides my father's unwillingness to part with his son, at first, and that no one has ever entered into bonds for me that I know of, nor did I ever hear of such a custom, as I must have done had any such arrangement been entered into for me, as the Turkish minister of foreign affairs presupposes.

"There is no need to state that the facts in the case do entitle me to the protection and privileges of a citizen of the United States, and I feel sure that since you have so kindly and faithfully done so much already for me and for the right, you will eventually, with persistence, see wrongs righted and satisfaction gained." (Mr. Arakelyan to Mr. Bayard, Aug. 20, 1885, For. Rel. 1885, 861.)

Where a Turk has been naturalized in the United States since 1869 without the consent of the Sultan, such consent can be obtained only by a petition to His Majesty sent through the Turkish minister

at Washington. This petition should be duly sworn to, should set forth the circumstances under which the petitioner left his native land, and should be accompanied with the evidence of his naturalization. The Department of State can not predict the result of such a petition; but the Department, if furnished with a copy of the petition in duplicate, will instruct the American minister at Constantinople to render such aid as may be found proper.

Mr. Bayard, Sec. of State, to Mr. Arakelyan, Aug. 17, 1885, 156 MS. Dom. Let. 554; Mr. Porter, Act. Sec. of State, to Mr. Arakelyan, Feb. 13, 1886, 159 MS. Dom. Let. 68; Mr. Olney, Sec. of State, to Mr. Ghiz, Oct. 27, 1896, 213 MS. Dom. Let. 410; Mr. Hill, Assist. Sec. of State, to Messrs. Michaelian Brothers, June 20, 1899, 238 MS. Dom. Let. 116; Mr. Hill, Assist. Sec. of State, to Messrs. Boghasian, Dec. 14, 1900, 249 MS. Dom. Let. 491; Mr. Adeë, 2nd Assist. Sec. of State, to Mr. Shibley, Jan. 26, 1901, 250 MS. Dom. Let. 413.

The Department of State can not decide as to the phraseology which the petitioner shall employ. He must use language and furnish evidence "which would prove acceptable to the Turkish representative," to whom the petition "must necessarily be addressed." (Mr. Bayard, Sec. of State, to Mr. Arakelyan, Feb. 25, 1886, 159 MS. Dom. Let. 160.)

The cases referred to in the letters above cited related chiefly to the imposition of taxes on relations of the naturalized citizens.

In one case complaint was made of the exaction from a brother in Turkey of a poll and military tax assessed against the complainant and his four brothers in the United States. (Mr. Olney to Mr. Ghiz, *supra*.)

In another case a person in Turkey was required to pay the personal taxes of his brother and three cousins, who were in the United States, and of whom all but one had become naturalized citizens. (Mr. Hill to the Michaelian Brothers, *supra*.)

In yet another case release was sought from assessment poll taxes. (Mr. Hill to the Messrs. Boghasian, *supra*.)

In each case the complainant was advised of the Turkish requirement, as above set forth.

For other and similar cases of poll or military taxes, with similar advice, see Mr. Adeë, Second Assist. Sec. of State, to Mr. Deoshamajian, Oct. 2, 1900, 248 MS. Dom. Let. 202; Mr. Hill, Assist. Sec. of State, to Mr. Kachadoorian, Jan. 4, 1901, 250 MS. Dom. Let. 83; Mr. Cridler, Third Assist. Sec. of State, to Mr. Shibley, Jan. 9, 1901, 250 MS. Dom. Let. 147.

Mr. Bayard stated, Aug. 3, 1886, that all efforts to have Mr. Arakelyan's American allegiance recognized by the Turkish Government "were without avail," except on condition that he should "obtain the Imperial *iradé* spoken of in the Turkish law." Mr. Arakelyan accordingly presented a petition to the Turkish minister at Washington, and the American minister at Constantinople was instructed to support it.

Feb. 7, 1889, Mr. Straus, then American minister at that capital, transmitted to his Government the official act of the Turkish Government, recognizing Mr. Arakelyan's American citizenship.

Mr. Bayard, Sec. of State, to Mr. Randall, Aug. 3, 1886, 161 MS. Dom. Let. 138; Mr. Straus, min. to Turkey, to Mr. Bayard, Sec. of State, No. 37, Oct. 24, 1887, 47 MS. Desp. Turkey; Mr. Bayard, Sec. of State, to Mr. Straus, No. 110, June 13, 1888, MS. Inst. Turkey, IV. 669; Mr. Straus to Mr. Bayard, No. 171, Feb. 7, 1889, 48 MS. Desp. Turkey.

The paper in question was sent on to Mr. Arakelyan, who paid the cost of obtaining it, amounting to \$4.31. (Mr. Blaine, Sec. of State, to Mr. Straus, min. to Turkey, No. 198, March 18, 1889, MS. Inst. Turkey, V. 49.)

The case of Arakelyan is mentioned in Mr. Adey, Second Asslt. Sec. of State, to Mr. Egulman, June 16, 1890, 178 MS. Dom. Let. 45.

In May, 1892, the American legation at Constantinople was instructed to exercise its good offices in behalf of the petition of Mr. Dikran Taylor, for release from Ottoman citizenship. (Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 325, May 11, 1892, MS. Inst. Turkey, V. 349.)

In 1896 it was stated that the only *iradé*, of which the Department of State had "recent knowledge," was that granted to Mr. Arakelyan. (Mr. Rockhill, Act. Sec. of State, to Mr. Beshgetour, Aug. 3, 1896, 211 MS. Dom. Let. 620.)

"I have the honor to inform you that I have finally secured the promise of this Government to recognize Garabed Kevorkian, a naturalized Armenian, as a citizen of the United States. He was the subject of your dispatch No. 33 of August 8, 1893. He was naturalized without the consent of the Sultan, long after the Turkish law of 1869, but made his declaration of intention to become a citizen of the United States before that date.

"The recognition by the Porte of his citizenship, as dating from the time when the 'declaration of intention' was filed, has not been without difficulty; especially since in this case about ten years was permitted to elapse before naturalization. . . . This man's civil rights were not threatened. He had made a trade and wished himself described in the deed as a citizen of the United States."

Mr. Terrell, min. to Turkey, to Mr. Gresham, Sec. of State, Oct. 12, 1893, For. Rel. 1893, 692.

See, also, For. Rel. 1893, 651, 703.

"The Department is in receipt of your letter of May 26th last in regard to the litigation concerning certain real property pending in Turkey between your step-brother and yourselves.

"It appears from a report received from our legation at Constantinople that the laws of Turkey regard persons of Ottoman birth who changed their nationality before 1869, or with the consent of the Imperial Government, as foreigners, and such persons can claim the benefits of the law of January 18, 1867, conceding to foreigners the right of holding real estate in the Ottoman Empire, the special law relating to Ottoman subjects who had changed their nationality not having been enacted.



"Ottoman subjects who have been naturalized since 1869, without the Imperial sanction, are, notwithstanding, regarded by Turkish law as subjects, and such persons are unable to accomplish any act affecting their real property before a Turkish court or bureau unless they accept the designation of 'Ottoman subject.'

"There is a provision of law by which this latter class may have pronounced against them a judgment involving the loss of Ottoman citizenship and entailing the forfeiture of their real property, but it is stated that this provision has never been put into practice by the Ottoman Government.

"In any event it will be necessary for you to establish your title to the property in the courts of Turkey, and this Government could only intervene in case of a denial of justice or of treaty rights."

Mr. Adee, Act. Sec. of State, to Messrs. Seropian Brothers, August 6, 1897, 220 MS. Dom. Let. 125.

See, also, Mr. Adee, Second Assist. Sec. of State, to Mr. Zabriskie, Sept. 22, 1900, 248 MS. Dom. Let. 102.

"By the law annexed to the real estate protocol of August 11, 1874, between the United States and the Ottoman Porte, . . . the right of subjects of Ottoman birth who have changed their nationality to hold and presumably to inherit real estate, is to be governed by a special law. The Turkish Government holds that the law of nationality, which refuses recognition of the acquisition of a foreign nationality by a Turk who has become naturalized abroad without Imperial consent, operates as a special law to deprive an Ottoman subject, so naturalized since 1869, of the right to hold real estate as an alien."

Mr. Moore, Act. Sec. of State, to Mr. Pashayan, Sept. 9, 1898, 231 MS. Dom. Let. 292.

(e) EXPULSION CASES.

§ 463.

"I have to acknowledge the receipt of your No. 188 of the 21st ultimo in regard to the attempted expulsion of Dr. Abkarian, a naturalized citizen of the United States, from Turkey. You state that on the evening of the 20th of November you were called upon at your residence by Naoum Effendi, who is in charge of the foreign correspondence at the ministry of foreign affairs and were informed by him that an order had been received from His Highness the Grand Vizier, based upon information from the minister of police, for the expulsion of Dr. Abkarian, who is of Armenian parentage, and who arrived in Turkey from the United States over two months ago, on the ground that he is a man dangerous to the public peace. You state that no evidence that he is such a man has been offered to you,

and you are at present unable to state what the charges against him may be, but that you are promised such information as the foreign office may be able to obtain from the minister of police.

"It seems that Dr. Abkarian has left Constantinople, perhaps for Sivas, and that from the steamer in which he took passage he wrote a letter, the purport of which is not altogether clear. He says it was impossible for him to remain in Constantinople longer than a week or more with justice to himself and to the 'cause' for which he had 'commenced' his 'travelling.'

"In view of the questions raised in this case, the Department would find it difficult to instruct you by telegraph, as requested. You advert to the fact that the power to expel foreigners is one incident to sovereignty, but at the same time suggest a doubt whether it may be exercised arbitrarily, even in a country where there are political disturbances, such as at present exist in Turkey, and especially where, owing to the capitulations, extraterritoriality is enjoyed by foreigners. This question, as you observe, is one of great importance to all naturalized Americans in Turkey.

"It can not be maintained that in respect to foreigners within her territory Turkey exercises the rights ordinarily inherent in territorial sovereignty. Her control over her foreign population is limited, both by the capitulations and by treaties. Next to the right to try foreigners for offenses, the most important power that a government can exercise in regard to them is that of expulsion. In the full exercise of this power it would be possible virtually to avoid the results of the concession of extraterritorial privileges. This fact appears to be conceded by the Porte in its appeal to you in the present case.

"Putting aside the question of jurisdiction as to the punishment of offenses, which has been amply discussed in the pending case of Serope Gurdjian, there are stipulations in the treaty between the United States and Turkey which would seem to be inconsistent with the free and independent exercise by the Porte of the power of expulsion. 'Citizens of the United States,' says article 4 of the treaty of 1830, 'quietly pursuing their commerce and not being charged or convicted of any crime or offense, shall not be molested; even when they may have committed some offense, they shall not be arrested and put in prison by the local authorities.' Such is the language of the article as officially published by the United States. According to the French translation of the original Turkish as furnished by the Turkish Government, the stipulation may be expressed as follows: 'American citizens peaceably attending to matters of commerce shall not be molested without cause, so long as they shall not have committed any offense or fault, and even in case of culpability they shall not be imprisoned by the judges and police agents.' In the case of

Gurdjian it was expressly admitted by the Turkish Government that its police agents had no authority to arrest citizens of the United States, and accordingly regret was expressed for the arrest in that case, and a promise made that the offending officials would be punished. Without the power to arrest the power to execute the decree of expulsion is absent, and in the end the appeal must be made to the minister of the United States, as has been done in the present case.

"While you are not informed of the specific grounds of complaint against Dr. Abkarian, you conjecture that, whether well founded or not, they may have some connection with the present Armenian agitation. In this relation it is proper to observe that it is a well-settled principle of international law that foreigners are not justified in intermeddling with the politics of the country in which they reside. Such a course of conduct is incompatible with their claim of foreign nationality and can not be sustained by their government, for the reason that to do so would be to claim the right of intervention and control in the domestic affairs of other countries. The Government of the United States is always disposed to maintain the just claims of its citizens abroad. This disposition it has fully illustrated in its care for its citizens residing in Turkey, both native and naturalized. It is well known that, in regard to the latter, the Turkish Government has made strong objections to the exercise of some of the rights claimed by this Government, but this Department has never admitted any discrimination in their treatment and has extended to them the fullest measure of protection. This it has done to them as citizens of the United States who, in swearing allegiance to this Government, have renounced their political connection with that of their origin. In returning to their native country they are bound to act consistently with their new relations and to abstain both from political agitation and from any connection with political interests from which they have dissociated themselves. To mix in the political affairs or to be concerned in movements against the government of the country whose allegiance they have renounced is grossly at variance with their pretensions and a practical renunciation of their newly acquired citizenship. The Government of the United States can not, by sustaining such conduct, become a party to it.

"As the Department is not informed of the facts upon which the complaint against Dr. Abkarian is founded, it is unable to give you specific instructions as to your course in regard to it. But it is not the purpose of this Government to employ its power so as to enable Ottoman subjects who have obtained naturalization in the United States to return to their native country and engage in political agitation.

"These general views are conveyed to you for your information as to the way in which the Department regards the various questions

lately raised. Further and more specific instructions will be sent you as occasion may arise."

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 147, Jan. 14, 1891, MS. Inst. Turkey, V. 196.

See, also, Mr. Blaine to Mr. Hirsch, No. 148, Jan. 14, 1891, MS. Inst. Turkey, V. 200.

As to Gurdjian's case, see *supra*, § 284; and Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Feb. 9, 1894, For. Rel. 1894, 753.

"Mr. Gresham recognizes as an attribute of sovereignty the right of Turkey to exclude aliens, and to deport or expel undesirable classes or individuals; the absence of a treaty of naturalization makes it impossible to insist that the naturalization of Armenians in the United States shall be respected by that Government. He instructs Mr. Terrell to use his best efforts for the relief of arrested persons without losing sight of the foregoing."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, tel. Oct. 27, 1893, For. Rel. 1893, 699.

See, also, For. Rel. 1893, 684, 685-688, 689, 693.

"Mr. Terrell reports that the Turkish Government will relinquish the right of imprisoning returning Turkish subjects naturalized in the United States without the consent of the Sultan since 1869 and will confine the assertion of its rights to expel undesirable persons or classes of American citizens to such subjects." (Mr. Terrell to Mr. Gresham, tel., Nov. 15, 1893, For. Rel. 1893, 702.)

"Mr. Gresham acknowledges receipt of Mr. Terrell's telegram of the 15th, instructs him to protest against punishment of Armenians who have become citizens of the United States as criminals, as well as against their being imprisoned on any ground for too long a time, although admitting that the Porte has the right to expel them and, incidentally, to arrest them for the purpose of expulsion." (Mr. Gresham to Mr. Terrell, tel., Nov. 18, 1893, For. Rel. 1893, 703.)

See, also, memorandum of conversation between Mr. Terrell and Said Pasha, Nov. 14, 1893, For. Rel. 1893, 704; and Mr. Uhl, Act. Sec. of State, to Mr. Terrell, Dec. 7, 1893, For. Rel. 1893, 706.

"Your excellency will doubtless recall the interviews which I have had with you concerning the arrest of two individuals—one at Salonica and the other at Constantinople. In response to the telegrams on the subject which I thereupon sent to His Excellency Said Pasha, I have just received, this very day, his reply. Here it is:

"Article 6 of the Law of the Ottoman Nationality gives to the Imperial Government the right to declare loss of the quality of an imperial subject against any Ottoman subject who shall have been naturalized in foreign parts without the authorization of his Sovereign. In this case, by the terms of the said article, the loss of the quality of an Ottoman subject entails as of full right the interdiction of the return to the Ottoman Empire of him who may have incurred it.

"On the other hand, it is known that our naturalization conven-

tion could not hitherto be put in operation on either part, so that we can not act at present in respect of such former Ottoman subjects as may return to Turkey after having acquired American nationality without prior authorization of His Imperial Majesty the Sultan, except by applying to them either the 5th article of the law in question, which authorizes the imperial authorities to treat them simply in the character of an Ottoman subject as in the past, or the above-cited provisions of the 6th article of the same law.

"The arrest of the two above-mentioned individuals is therefore thus explained. The Imperial Government, which had ground to suspect their political intentions as former Ottoman subjects, was constrained to decree their expulsion in application of the sixth article above cited. Their arrest, ordered to this end, has, moreover, been only provisional.

"I hope that the foregoing explanations will satisfy your excellency, and that they will prove to you that the measures enforced by the imperial authorities, are not arbitrary, but are in all points in conformity with the laws and regulations of the Empire."

Mavroyeni Bey, Turkish min., to Mr. Gresham, Sec. of State, Nov. 22, 1893, For. Rel. 1893, 713.

For the text of the Ottoman Law of Nationality of Jan. 19, 1869, and of a circular of March 26, 1869, in relation thereto, see For. Rel. 1893, 714-715.

"I have the honor to acknowledge the receipt of your note of the 22d instant, in which you present certain considerations touching the treatment of persons of Armenian origin who may return to Turkey after having been naturalized in the United States.

"The cited articles 5 and 6 of the Ottoman law of January 19, 1869 (6 Cheval, 1285), and the announced policy of the Turkish Government in the application thereof, have had my careful attention.

"In proceeding under the sixth article, whereby declaration by the Imperial Government of loss of Ottoman nationality is claimed to be followed by the right of exclusion or expulsion of the returning Armenians, the Turkish Government removes all question as to the citizenship of the person, and rests its action on the very generally conceded claim of the right to exclude or expel aliens whose coming within Ottoman jurisdiction may be deemed objectionable.

"I am gratified to learn that, as was confidently to be expected, this treatment of the returning naturalized Armenian as an undesirable alien involves, in case he be found within Turkish territory, no other arrest or detention than such as may be necessary to accomplish the deportation of the individual, thus excluding the punitive phase, which might be open to serious contention."

Mr. Uhl, Act. Sec. of State, to Mavroyeni Bey, Turkish min., Nov. 28, 1893, For. Rel. 1893, 715.

"Turkey complains that her Armenian subjects obtain citizenship in this country, not to identify themselves in good faith with our people, but with the intention of returning to the land of their birth and there engaging in sedition. This complaint is not wholly without foundation. A journal published in this country in the Armenian language openly counsels its readers to arm, organize, and participate in movements for the subversion of Turkish authority in the Asiatic provinces. The Ottoman Government has announced its intention to expel from its dominions Armenians who have obtained naturalization in the United States since 1868.

"The right to exclude any or all classes of aliens is an attribute of sovereignty. It is a right asserted and, to a limited extent, enforced by the United States, with the sanction of our highest court. There being no naturalization treaty between the United States and Turkey, our minister at Constantinople has been instructed that, while recognizing the right of that Government to enforce its declared policy against naturalized Armenians, he is expected to protect them from unnecessary harshness of treatment."

President Cleveland, annual message, Dec. 4, 1893, For. Rel. 1893, x.

As to the journal above referred to, see For. Rel. 1893, 712-713.

For the expressions of the Turkish Government concerning the President's message, see For. Rel. 1894, 728.

"In my last annual message I adverted to the claim on the part of Turkey of the right to expel, as persons undesirable and dangerous, Armenians naturalized in the United States and returning to Turkish jurisdiction. Numerous questions in this relation have arisen. While this Government acquiesces in the asserted right of expulsion it will not consent that Armenians may be imprisoned or otherwise punished for no other reason than having acquired without imperial consent American citizenship." (President Cleveland, annual message, Dec. 3, 1894, For. Rel. 1894, xv.)

"As was declared by the President, in his annual message of the 4th of December last, the right to exclude any or all classes of aliens is an attribute of sovereignty, asserted and, to a limited extent, enforced by the United States themselves with the sanction of their highest court. While the President, in the absence of a treaty of naturalization, recognized the right of the Turkish Government to enforce its policy against naturalized Armenians, he made no announcement inconsistent with the position that excluded or expelled Armenians may claim the protection of this Government as naturalized citizens.

"The Turkish Government has, however, apparently not comprehended the nature of the concession made by the Government of the United States, or apprehended the extent of the duty of this Government in respect to persons whose American citizenship is thus placed beyond question. . . .

"Ottoman subjects who voluntarily leave their native land and are duly naturalized here become clothed with full rights of citizenship,

and are entitled to the protection of this Government in Turkey against all claims of that Government originating after naturalization. And while the sovereign right of Turkey to exclude, and under proper circumstances to expel, undesirable classes of people from the imperial dominions is recognized, the United States can not and will not consent that their naturalized citizens formerly the subjects of Turkey shall be there imprisoned or otherwise punished simply because they have become invested with citizenship here without the imperial permission.

"It follows that, while such arrest and detention as may be fairly incident to the exclusion or deportation of such persons will not be objected to when directed to the single purpose of preventing their sojourn in the Ottoman Empire, the right to arrest and imprison them for other purposes is not conceded."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, March 29, 1894, For. Rel. 1894, 754, 755-756.

Mavroyeni Bey, Turkish minister at Washington, communicated to Mr. Gresham, Sec. of State, April 5, 1894, a telegram from Saïd Pasha, min. of for. affairs, reading as follows:

"Please allow no doubt to remain in the mind of the Government of the United States on the following question: The Cabinet of the United States is under the impression that we imprison Ottoman subjects, naturalized citizens of the United States, who return to the Empire, because they have changed their nationality. Such, however, is not the case, for, in the first place, such a procedure has never been followed to this day. In the second place, the law directs that all our subjects who have themselves naturalized abroad without complying with the laws and regulations bearing on the question, shall be prohibited from returning to Turkey, and when any of their number return to the country of their origin we are content with expelling them from the Ottoman territory. If, then, some few among these latter are imprisoned, it is certainly not by reason of their naturalization in the United States, but solely for some difficulty they may be involved in with the law." (For. Rel. 1894, 772.)

See, however, the cases of the prolonged detention and final expulsion of Mr. Arakjlnjian, and of Mrs. Toprahanian and her two children, at Alexandretta. (For. Rel. 1894, 769, 770, 771, 772-774, 775, 777.)

"I have the honor to acknowledge the receipt of your No. 184 of May 16, instructing me to 'examine and report whether Turks naturalized in other countries receive the same treatment as those who become citizens of the United States;' and also inclosing an anonymous petition to the President, the most important statement in which is 'that unnaturalized Armenians and Armenian citizens of countries other than the United States are allowed to return' to Turkey, while those naturalized in the United States are not. . . .

"With regard to the naturalization of Turks in foreign countries, three different systems seem to prevail, caused by the fact that Turkey still holds to the doctrine of perpetual allegiance.

"(1) In some countries, of which France is a type, a Turk is not admitted to citizenship unless he produces the evidence of the imperial sanction to his change of nationality. In these countries all conflict of laws with Turkey concerning nationality is thus avoided.

"(2) In Great Britain Turks may be naturalized without having obtained the imperial consent, but they are no longer protected or considered as British subjects if they return to the Ottoman Empire. All British passports of naturalized citizens contain the following language:

"This passport is granted with the qualification that the bearer shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."

"Here, also, no conflict of laws arises between Turkey and Great Britain.

"(3) The Government of the United States would seem to be the only one which admits Turks to citizenship without their having obtained the imperial sanction, and in addition claims them as citizens in Turkey as well as in all other countries. Thus there is a conflict of laws between America and Turkey over all Turks naturalized in the United States without imperial consent who return to the Ottoman Empire.

"The statement 'that unnaturalized Armenians and Armenian citizens of countries other than the United States are allowed to return' is probably true, for the former have, of course, never ceased to be Turks, and the latter become Turks again as soon as they return, as they have never been given up by Turkey and are now no longer claimed by the country which naturalized them. Hence, whatever treatment they might receive when they returned to Turkey would not be made the subject of an official communication by a foreign power claiming them as citizens."

Mr. Riddle, chargé at Constantinople, to Mr. Gresham, Sec. of State,  
June 29, 1894, For. Rel. 1894, 762.

"You inclose a memorandum of an interview which you had, on August 7, with the grand vizier and minister for foreign affairs on the general subject of expatriation of Turkish subjects, from which it appears that Turkey claims the right to punish, by expulsion or exclusion from the Ottoman Empire, any of its natives who were naturalized by another Government without the Sultan's consent, and that the naturalization of an Ottoman subject, no matter of what race, is regarded as an offense in itself for which the Porte claims the right to punish him.



"This Government, while abundantly showing its disposition to respect the sovereign rights of Turkey in regard to the exclusion or expulsion of objectionable aliens, as aliens, has repeatedly made its position known touching any possible claim of Turkey to punish its former subjects on the ground of their having embraced American citizenship under the due operation of our laws. Such a pretension will not be acquiesced in, and you will earnestly contest it should it be seriously put forward."

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, Aug. 30, 1894, For. Rel. 1894, 738. The memorandum referred to was as follows:

"In an interview with the grand vizier on the 7th instant he claimed for Turkey the right to punish, by expulsion or exclusion from the Ottoman Empire, any of its natives who, after being naturalized by another Government without the Sultan's consent, returned or attempted to return. He recognized the verbal agreement formerly made with me, which limits his powers over such parties to expulsion or exclusion, but claimed the right to inflict this punishment for the offense of being naturalized without the consent of the Sultan. He stated that Greeks naturalized without such consent, and returning would be treated with more indulgence than native Armenians thus naturalized, so long as that race of men abstained from sedition." (Id. 737.)

Mr. Terrell, in another memorandum, relating to an interview on the same day with Said Pasha, minister of foreign affairs, reported the latter to have said: "It is impossible for us ever to agree that an Ottoman subject can transfer his allegiance unless the Sultan permits it, and it is also impossible that we can ever agree to your construction of Article IV. Once a clerk of our Government embezzled 50,000 plasters. We arrested him, ignorant that your country had naturalized him. Your consul claimed the right to try him; we could not consent, and the thief went unpunished." (Id. 736, 737.)

For the refusal to present a claim of Krikor Manassian for \$25,000 for his expulsion, see Mr. Hill, Assist. Sec. of State, to Mr. Bell, Dec. 7, 1898, 233 MS. Dom. Let. 102.

But where it was alleged that when a person was expelled his baggage, money, and other effects were taken from him, it was stated that if the facts were found to be as stated a demand would be made for the return of the property. (Mr. Adey, Act. Sec. of State, to Mr. Eggleston, Oct. 20, 1900, 248 MS. Dom. Let. 454.)

"The published correspondence in the volumes of the Foreign Relations for the past two years, together with the statements made by the President in recent annual messages, show that the Turkish Government claims the right to exclude from the Ottoman territories, or to deport in case they be found therein, naturalized citizens of the United States of Armenian birth who have become such naturalized citizens without imperial consent since the year 1869. The right is claimed in exercise of a prerogative of sovereignty as an executive measure in regard to aliens whose presence in the Empire may be deemed prejudicial to the public interest. Its enforcement in regard

to such persons has not been opposed, nor has remonstrance been made save in the case of arrest or punitive proceedings against the parties on the ground of their having become citizens of the United States without imperial permission. United States passports held by persons so situated are recognized by the Turkish authorities as evidence of the fact of naturalization and citizenship, but the recognition so accorded does not prejudice the exercise of the sovereign right of exclusion or expulsion for the causes stated."

Report of Mr. Olney, Sec. of State, to the President, Jan. 22, 1896, S. Doc. 83, 54 Cong. 1 sess.; For. Rel. 1895, II. 1471.

Mr. Terrell, minister to Turkey, to Mr. Olney, Secretary of State, August 5, 1896, reported upon the imprisonment at Aleppo of certain naturalized citizens of the United States whose release he had demanded. Referring to an interview which he had had on the subject with the Turkish Government, he said: "The interview resulted in an assurance that the matter will be brought at once, without the usual delay, to the attention of the Sultan, and my demand for compliance with the surrender of the men in accordance with the *modus vivendi* agreed upon by him personally with me. That *modus vivendi* limits the right to expel undesirable persons to those who have been naturalized since 1869 without the Sultan's consent and prohibits unnecessary imprisonment." (For. Rel. 1896, 914.)

It appears that some or all of the persons imprisoned were charged with participation in revolt, and that the Turkish authorities thought that their simple expulsion would not answer the requirements of the situation. (For. Rel. 1896, 915.)

In a subsequent despatch, of August 19, 1896, Mr. Terrell said: "The Sultan and Porte, under three successive administrations, have recognized our *modus vivendi*, on making which the Sultan grasped my hand over two years ago. Under it, Mooradian, Krikor Arakellian, and Melcoun Guedjian (besides others) were surrendered to me." (For. Rel. 1896, 918.)

September 23, 1896, Mr. Terrell reported that the men imprisoned were arrested in armed resistance to the Government, and that they surrendered on the promise that they would be sent out of the country. Their situation remained unchanged, and "in the present condition of unrest and suspicion but little can be hoped for beyond saving their lives." (For. Rel. 1896, 922.)

Orders were subsequently given by the grand vizier to alleviate the condition of three of the persons who were sick.

December 20, 1896, Mr. Terrell sent to Mr. Olney the following telegram: "At my demand Diradourlian, convicted at Trebizond of sedition, has been surrendered to me under orders of expulsion. The release and expulsion of the nine revolutionists in prison at Aleppo promised me by the grand vizier. Such people, unless helped to reach Christian ports, must return to prison. Bible House people refuse to advance relief funds from America to such people in distress who have become American citizens. I will, as heretofore, pay their ship passage, but I hope in future the Government will aid me." (For. Rel. 1896, 924.)

"In consequence of recent events in Constantinople, certain members of the Armenian community, fathers of families or bachelors, artisans, merchants, or others, continue to emigrate. Then individuals of no certain occupation find their way somehow into the various vilayets of the Empire.

"Now, the Armenian agitators attribute this emigration to an alleged want of confidence and nonexisting security in the capital. They invent and publish in this connection all sorts of lies and incorrect statements.

"Since the foundation of the Ottoman Empire, need it be said, the Imperial Government has never ceased pursuing a just line of conduct, the object being to safeguard the lives, property, and honor of its loyal subjects. The Imperial Government is in a position, under the protecting scepter of His Imperial Majesty the Sultan, to prevent all cause of anxiety or fear which might induce further emigration. Thus, all who desire to leave the country must sign a document and also have a solvable guaranty, confirmed by the patriarchate, that they will not return to Turkey. This declaration must be accompanied by the likeness of the emigrant, and it will only be after fulfilling such formalities that emigration will be authorized. The passports delivered to these emigrants will state that such persons will not be allowed to set foot again on Ottoman territory. The explanation in question, as well as a declaration that the emigrants have lost Ottoman nationality, will be duly inscribed in the registers of the commission ad hoc, in the archives of the competent department, as well as at the chancellery of the Armenian patriarchate. A delay of a month and a half, and in cases of plausible hindrance, two months' delay, commencing from to-day, will be granted to those who have gone abroad without authorization from the Imperial Government to return to their homes. In the event of their design to stay where they are, they must make a declaration to this effect in the Turkish embassies or legations abroad. Emigrants of this category will, nevertheless, lose their nationality as Ottoman subjects, unless they return to Turkey within the above-named period.

"Ottoman Armenian subjects who have emigrated under false names and yet by diverse means have returned to Turkey with foreign passports will not be recognized as foreign subjects, nor will they be allowed to live in any part of the Empire.

"Armenians who have emigrated during the past twenty years, and especially members of the committee of agitators, will not benefit from the present arrangement. Consequently they will not be permitted to return here. Every agitator who returns to Turkey will be arrested and brought before the ordinary tribunals.

"As regards Armenians of foreign nationality, who in great numbers are among the agitators as organizers of disturbance, the Gov-

ernment and the police find it difficult to distinguish between the one and the other. In consequence such foreign Armenians will not be allowed to assume Ottoman nationality, in accordance with the law which authorizes the admission of other foreigners to become Ottoman subjects."

Imperial iradé of the Turkish Government, Oct. 9, 1896, communicated to the Department of State by Mr. Terrell, American minister at Constantinople, Oct. 10, 1896, For. Rel. 1896, 937.

"A decree of the Turkish Government of October 9, 1896, prohibits from hereafter residing in Turkey any Armenian who has emigrated in the last twenty years." (Mr. Hill, Assist. Sec. of State, to Mr. Momiroff, Feb. 1, 1899, 234 MS. Dom. Let. 347.)

(f) UNRATIFIED TREATY OF 1874.

§ 464.

A naturalization treaty between the United States and Turkey was signed at Constantinople, Aug. 11, 1874.

In regard to the renunciation of acquired citizenship, it followed (Art. II.) the provisions usually found in the treaties of the United States, except that it provided that the intention not to return to the country of adoption "shall" (instead of "may") be considered as established by a two years' residence in the country of origin. The Senate of the United States, however, amended the treaty by substituting the usual form. The ratifications of the treaty as thus amended were exchanged at Constantinople, April 22, 1875, but with an explanation by the Ottoman Government, which in effect restored the original meaning. The Government of the United States in consequence declined to consider the exchange as effective, and refused to proclaim the treaty.

The situation remained practically unchanged till January 16, 1889, when Mr. Straus, then minister of the United States at Constantinople, reported that he had obtained the Sultan's iradé accepting the treaty as amended, without any qualification, and annulling all former Turkish interpretations, the treaty to take effect on its proclamation by the President. In view, however, of the lapse of fourteen years since the Senate's approval of the treaty, the President decided again to take the advice of that body. He accordingly resubmitted the treaty, Feb. 27, 1889; and by a resolution of February 28, 1889, the Senate advised and consented to the exchange of ratifications "only upon the distinct understanding to be had between the two Governments that Article II. of the convention, as amended by the Senate, shall not be construed to apply to persons already naturalized in either country."

In a note to the Turkish minister at Washington, of January 31, 1891, Mr. Blaine, as Secretary of State, stated that the resolution

of the Senate was understood to mean that the provisions of the article in question "shall not apply to citizens or subjects of either country naturalized prior to the date of the exchange of ratifications, but that the effect of the return of such persons to their native country shall be determined according to the rules that existed prior to the exchange of the ratifications."

The ratifications remained unexchanged.

Mr. Olney, Sec. of State, to Mr. Terrell, min. to Turkey, Oct. 15, 1896, For. Rel. 1896, 933.

See also Mavroyeni Bey, Turkish min., to Mr. Olney, Sec. of State, Oct. 2, 1896; Mr. Olney, Sec. of State, to Mavroyeni Bey, Turkish min., Oct. 15, 1896: For. Rel. 1896, 929, 932.

See, further, as to this treaty, Mr. Bayard, Sec. of State, to Mr. Cox, min. to Turkey, Nov. 28, 1885, For. Rel. 1885, 885.

Mr. Bayard to Mr. Cox, March 4, 1886, contains a long historical review of the naturalization question with Turkey, and discusses various forms of stipulation touching the effect of return to the country of origin. (MS. Inst. Turkey, IV. 392.)

President Cleveland, in his annual message of Dec. 6, 1886, said that he trusted that he might soon be able to announce a favorable settlement of the differences as to the interpretation of the treaty signed in 1874.

Sept. 4, 1886, Mr. Cox transmitted to Said Pasha a declaration which was designed to remove the difficulty. Said Pasha, Sept. 18, 1886, expressed his satisfaction and the readiness of his Government to ratify and proclaim the treaty on the basis of Mr. Cox's declaration. (Mr. Cox, min. to Turkey, to Mr. Bayard, Sec. of State, No. 236, Sept. 10, 1886; Mr. King, chargé, to Mr. Bayard, No. 243, Sept. 21, 1886: 46 MS. Desp. Turkey.)

The Government of the United States declined to approve the declaration, on the ground that it contained ambiguities and raised implications which rendered it inexpedient and inadmissible as the basis of ratification. (Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, No. 27, June 24, 1887, MS. Inst. Turkey, IV. 586.)

See, also, Mr. Straus to Mr. Bayard, No. 17, Aug. 2, 1887, 47 MS. Desp. Turkey; Mr. Bayard to Mr. Straus, No. 40, Sept. 1, 1887, MS. Inst. Turkey, IV. 607.

As to the resolution of the Senate of Feb. 28, 1889, and the subsequent failure to ratify the treaty, see Mr. Blaine, Sec. of State, to Mr. Hirsch, Dec. 1, 1890, MS. Inst. Turkey, V. 166; same to same, No. 138, Dec. 9, 1890, id. 169; Mr. Wharton, Act. Sec. of State, to Mr. Hirsch, No. 179, March 27, 1891, id. 234; Mr. Gresham, Sec. of State, to Mavroyeni Bey, Turkish min., March 27, 1894, For. Rel. 1894, 780; Mr. Gresham, Sec. of State, to Mr. Lamont, Dec. 22, 1894, 200 MS. Dom. Let. 703; Mr. Uhl, Act. Sec. of State, to Mr. Field, March 9, 1895, 201 MS. Dom. Let. 120.

#### (18) VENEZUELA.

#### § 465.

"Your dispatch No. 45, of the 16th ultimo, upon the subject of Miguel Felipe and Bartholome Antich, natives of Venezuela, but naturalized in this country, has been received. The course taken by

you in regard to the matter is approved. The Venezuelan minister for foreign affairs, however, seems to have mistaken the meaning of the clause of the constitution of that republic to which he refers as justifying their claim to jurisdiction over those persons. That clause merely affirms a truism contained in many other constitutions, and founded upon public law, that all persons born in a country are to be regarded as citizens thereof. It does not deny the right of expatriation, as the minister appears to suppose. Few governments now make such a denial, and the Department is not aware of any law of Venezuela which prohibits emigration from that country and naturalization elsewhere. If, however, as appears to be the case, the persons referred to propose to return to the United States, that step, if carried into effect, would relieve us from further controversy in regard to their particular case."

Mr. Fish, Sec. of State, to Mr. Pile, min. to Venezuela, June 22, 1872, For. Rel. 1872, 716.

"Article 5 [of the constitution of Venezuela, adopted by the National Constituent Assembly June 12, 1893, and promulgated July 5, 1893, superseding the constitution of April 16, 1891, which was the same as that of April 27, 1881, except as to the power of amendment] declares the law of citizenship. Division (a), section 1, is the same as in the former constitution, and adopts the rule of *jus soli* in its entirety, declaring every person born in the territory of Venezuela a Venezuelan, whatever may be the nationality of his parents. Division (a), section 2, and division (b), section 1, following the former constitution, make children born abroad of a Venezuelan father or mother Venezuelan citizens, provided they become domiciled in Venezuela and declare their desire to be such; but the two sections distinguish between children so born of a native Venezuelan parent and of a naturalized Venezuelan parent, declaring the former native and the latter naturalized citizens. Division (a), section 3, simply declares the principle of international law that a child born abroad of a Venezuelan citizen in the diplomatic service is a native citizen.

"Division (b), sections 2 and 3, provide for the naturalization of foreigners, and like the last constitution distinguish between the forms required for natives of any of the Spanish-American republics or of the Spanish Antilles and other foreigners. The last constitution (article 6) provided that 'those who fix their domicile and acquire nationality in a foreign country do not lose the character of Venezuelans.' This declaration against the right of expatriation has been omitted from the new constitution."

Mr. Partridge, min. to Venezuela, to Mr. Gresham, Sec. of State, July 12, 1893, For. Rel. 1893, 731.

The translation of art. 5 of the constitution, as enclosed by Mr. Partridge, reads:

"ART. 5. Venezuelans are such by birth or by naturalization.

"(a) Venezuelans by birth are—

"(1) All persons that have been or may be born on Venezuelan soil, whatever may be the nationality of their parents.

"(2) The children of a Venezuelan father and mother by birth who may be born on foreign soil, provided that they come to the country to take up their domicile in it and declare before competent authority their desire to be such.

"(3) Legitimate children that may be born on foreign soil or at sea of a Venezuelan father temporarily residing or traveling in the exercise of a diplomatic mission or attached to a legation of the Republic.

"(b) Venezuelans by naturalization are—

"(1) The children of a Venezuelan father or mother by naturalization, born outside of the territory of the Republic, if they should come to take up their domicile in the country and declare their desire to be Venezuelans.

"(2) Those born or that may be born in the Spanish-American republics or in the Spanish Antilles, provided that they may have fixed their residence in the territory of the Republic and manifested their desire to be Venezuelans.

"(3) Foreigners who have obtained a letter of naturalization or citizenship conformably to the law."

"The provision that all persons born on Venezuelan soil are citizens, whatever the nationality of their parents, is found in many Spanish-American countries, being derived from the Spanish constitution of 1812. (*See Foreign Relations, 1880, p. 113.*) It is in most cases either expressly or tacitly qualified by the necessary condition of being or remaining within the jurisdiction of the country of birth. The Venezuelan provision may be assumed to mean that children so born of alien parents possess a dual nationality, and that while in Venezuela their Venezuelan nationality prevails. In this light it is merely an enunciation of an obvious conflict of laws."

Mr. Adee, Act. Sec. of State, to Mr. Partridge, min. to Venezuela, July 26, 1893, For. Rel. 1893, 734.

The Constitution of Venezuela of April 27, 1904, Title III., Section 1, provides:

"ART. 8. Venezuelans are such by birth or naturalization.

"(a) Venezuelans by birth are:

"1. All persons born on Venezuelan soil, and

"2. The children of Venezuelan fathers, whatever the place of their birth may be.

"(b) Venezuelans by naturalization are:

"1. All persons born in the Spanish-American Republics, provided that they have acquired domicile in the Republic and shown their desire to become Venezuelans.

"2. Foreigners who have obtained naturalization papers according to the laws.

"3. Foreigners who become Venezuelans by virtue of special laws.

"4. Foreign women married to Venezuelans, as long as the matrimonial bond is in existence; but after the dissolution of the marriage the Venezuelan nationality shall be retained by the foreign wife, unless

she makes, within one year after the said dissolution, the declaration to which the following article refers." (Rodriguez, American Constitutions, I. 199-200.)

- I wish here to express my special appreciation of the excellent and useful work just cited, being a compilation of the political constitutions of the independent nations of America, with notes and appendices, by Dr. José Ignacio Rodriguez, the learned chief translator and librarian of the International Bureau of the American Republics.

### XIII. MODES OF EXPATRIATION.

#### 1. ACTS HELD TO EFFECT EXPATRIATION.

#### § 466.

In some of the opinions given under this head, it is difficult to escape the conclusion that the word "expatriation" may have been employed in the sense of forfeiture of the right to national protection, instead of in the full sense of change of home and allegiance. Much confusion has resulted from the failure to keep this distinction in mind.

There is no *mode* of renunciation by a citizen of his citizenship prescribed. But if he emigrates, carries his family and effects along with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States.

Black, At. Gen., 1857, 9 Op. 62.

Former citizens of the United States who have, by naturalization, become British subjects, are, while domiciled in the United States, entitled by treaty to all the rights of native-born British subjects.

Newcomb v. Newcomb (Ky. 1900), 57 S. W. 2.

If a citizen of the United States emigrates to a foreign country, and there, in the mode provided by its laws, renounces his American citizenship with a bona fide intent of becoming a citizen of such country, his course should be regarded by our Government as an act of expatriation.

Williams, At. Gen. 1873, 14 Op. 295.

Where a citizen of the United States at different times obtained Austrian passports, traveled as an Austrian subject, and resided many years in the country, he will be considered an Austrian, on the ground that consent, together with the laws of that country, has effected a change in his nationality.

Williams, At. Gen. 1872, 14 Op. 154.



Naturalization is the highest, but not the only, evidence of expatriation. Such acts, in addition to the selection and enjoyment of a foreign domicile, as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of a citizen of the country of domicile, such as accepting public employment, engaging in military services, &c., may be treated by this Government as effecting expatriation.

Williams, At. Gen. 1873, 14 Op. 295.

"A continuous residence under a foreign jurisdiction, of more than the lifetime of a generation, without some acts of allegiance, and the discharge of some of the duties of a citizen, would seem to raise a presumption of renunciation of citizenship."

Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871, 91 MS. Dom. Let. 211.

As Congress has not defined, by the statute of 1868 or otherwise, what may constitute expatriation, the Department of State is "forced to look elsewhere for an enumeration of the acts" which may have that effect. Chief Justice Marshall, speaking for the Supreme Court, said that the situation of an American citizen "is completely changed where, by his own act, he has made himself the subject of a foreign power." (2 Cranch, 119.) This opinion is recognized as furnishing, as far as it goes, a rule of action for the Department; but there are other cases "in which the voluntary expatriation is to be inferred, not from an open act of renunciation, but from other circumstances, as, for instance, a residence in a foreign land so constant, and under such circumstances, that a purpose of a change of allegiance may be reasonably assumed." "Each case as it arises must be decided on its merits."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 258.

"Until the year 1868 it was left embarrassed by conflicting opinions of courts and of jurists to determine how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. Congress then wisely swept these doubts away by enacting that 'any declaration, instruction, opinion, order, or decision of any officer of this Government which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of this Government.' But Congress did not indicate in that statute, nor has it since done so, what acts are deemed to work expatriation. For my own guidance in determining such questions, I required (under the provisions of the Constitution) the opinion in writing of the principal officer in each of the Executive Departments upon certain questions relating to this subject. The result satisfies me that fur-

ther legislation has become necessary. I therefore commend the subject to the careful consideration of Congress, and I transmit herewith copies of the several opinions of the principal officers of the Executive Department, together with other correspondence and pertinent information on the same subject.

"The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality. The papers submitted herewith indicate what is necessary to place us on a par with other leading nations in liberality of legislation on this international question. We have already in our treaties assented to the principles which would need to be embodied in laws intended to accomplish such results. We have agreed that citizens of the United States may cease to be citizens, and may voluntarily render allegiance to other powers. We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent."

President Grant, annual message, Dec. 1, 1873, For. Rel. 1873, I. vii.

"I have again to call the attention of Congress to the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality. Formerly, amid conflicting opinions and decisions, it was difficult to exactly determine how far the doctrine of perpetual allegiance was applicable to citizens of the United States. Congress, by the act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion, and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation, or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others, it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere."

President Grant, annual message, Dec. 7, 1874, For. Rel. 1874, x.

"The individual right of expatriation being admitted, the correlative right of the State to determine what acts are to be taken as evidence of such expatriation necessarily follows—it is a necessary and inevitable corollary."

Mr. Fish, Sec. of State, to Mr. Davis, mln. to Germany, June 28, 1875.  
MS. Inst. Germ. XVI. 67.

William Hess, a naturalized citizen of the United States, of Austrian birth, wishing to become a subject of Russia, applied to the American legation at St. Petersburg for the certificate, required by the Russian naturalization laws, that his Government had no objection to his change of allegiance. The legation, finding no precedent for such a case, prepared a form of certificate and submitted it to the Department of State for instructions. The Department replied: "I am aware of no statute authorizing or making it the duty of a diplomatic or other officer of the United States to give such a certificate. Mr. Hess's right to abandon his American citizenship, under the laws of this country, can not be questioned. This Government holds that the 'right of expatriation is a natural and inherent right of all people' (Rev. Stat. U. S., sec. 1999), and it would seem that by calling the attention of the Imperial Government to that provision Mr. Hess can accomplish his purpose."

Mr. Gresham, Sec. of State, to Mr. White, mln. to Russia, Oct. 2, 1894,  
For. Rel. 1894, 557.

Sec. to the same effect, Mr. Gresham, Sec. of State, to Mr. Coleman,  
chargé at Berlin, March 18, 1893, MS. Inst. Germany, XVIII. 672.

"While this Department is not entitled to issue, at their request, certificates to particular citizens to the effect that it renounces their allegiance, it has no hesitation in saying that the Government of the United States recognizes the right of expatriation; and the Department has frequently declared that when a citizen of the United States becomes naturalized or re-naturalized in a foreign land he is to be regarded as having lost his rights as a citizen of the United States."

Mr. Bayard, Sec. of State, to Mr. Suzzara-Verdi, January 27, 1887, 162  
MS. Dom. Let. 677.

Sec. to the same effect, Mr. Bayard, Sec. of State, to Count Sponneck,  
Danish mln., April 10, 1888, For. Rel. 1888, I. 489.

"While it is not competent, under existing statutes, for the Department of State to issue at their request certificates to particular citizens admitting the renunciation of their allegiance, I have no hesitation in saying that the Government of the United States recognizes the right of expatriation; and the Department has frequently declared as a general principle that, when a citizen of the United States voluntarily becomes naturalized or renaturalized in a foreign

country, he is to be regarded as having lost his rights as an American citizen. The Department cannot take any action in regard to the request of Mr. Preisler, beyond making this general declaration of the principles of law recognized by this Government in cases similar to his."

Mr. Blaine, Sec. of State, to Count Sponneck, June 5, 1890, MS. Notes to Denmark, VII. 219.

In the case of a native American citizen who was admitted to Danish citizenship during his minority, and who had not yet come of age, the foregoing declaration of principles was qualified as follows: "As Mr. Andersen has not yet attained his majority, the Department is not prepared to admit that proceedings taken on his behalf in Denmark during his minority would deprive him of his right, upon reaching the age of twenty-one years, to elect to become an American citizen by immediately returning to this country to resume his allegiance here." It appeared that Mr. Andersen had personally petitioned for his discharge from American citizenship. (Mr. Wharton, Act. Sec. of State, to Count Sponneck, Danish min., Sept. 16, 1890, MS. Notes to Denmark, VII. 224.)

## 2. ACTS HELD NOT TO EFFECT EXPATRIATION.

### § 467.

"Joel Barlow felt himself at home in Paris. In 1788, at the age of thirty-four, he had first come abroad, and during seventeen exciting years had been rather French than American. In 1792 the National Convention conferred on him the privileges of French citizenship—an honor then shared only by Washington and Hamilton among Americans."

6 Adams' History of the United States, 245.

July 31, 1840, the Peruvian Government promulgated a decree, in which it was declared that, by par. 4, Art. VI., of the constitution, an alien, who resided four years in the Republic and married a Peruvian woman, was *ipso facto* naturalized. Parish priests were therefore directed not to marry an alien to a Peruvian woman, unless, if he had lived in Peru four years, he produced from the civil authorities the proper proof that he had already become a Peruvian, or, if he had lived there less than four years, that he would be ready to be naturalized at the end of that term. In the case, however, of a Spanish-American or a Spaniard, it was stated that, in conformity with paragraphs 5 and 6 of the same article, he must be inscribed as a naturalized Peruvian, no matter what the time of his residence.

Mr. Pickett, the chargé d'affaires of the United States at Lima, reported that such a construction had not before been given to Art. VI. of the constitution. A similar provision, he said, was contained in the constitution of 1834, with the difference that the term of resi-

dence was two years instead of four, but it was construed to mean only that an alien residing in Peru two years and marrying a Peruvian woman became entitled to Peruvian citizenship, if he chose to become naturalized.

Aug. 13, 1840, Mr. Pickett wrote to the minister of foreign affairs, protesting against the decree. He subsequently received, by a messenger from the foreign office, a copy of a pamphlet, entitled "Answer to the observations that have been published against the measures of the Government concerning the naturalization of foreigners." Mr. Pickett replied Sept. 2, 1840, and much correspondence ensued, without any immediate tangible result.

Feb. 17, 1841, however, Mr. Pickett reported that the Peruvian Government had so modified its position as to consent that the decree should not be construed to operate retroactively, and on Nov. 12, 1841, he wrote: "I enclose herewith a decree of the Peruvian Government, suspending the circular order of the 31st of July, 1840, which prohibited aliens from marrying in Peru, unless they were first naturalized. The suspension will be equivalent, probably, to a revocation, for I do not suppose there will be any further attempt to enforce this measure."

Mr. Pickett, *chargé d'affaires* to Peru, to the Department of State, No. 19, Aug. 10, 1840; No. 35, Feb. 17, 1841; No. 51, Nov. 12, 1841; 5 and 6 MS. Desp. Peru.

Citizens of the United States cannot divest themselves of allegiance to the Government by residence among Indian tribes, nor even by becoming members thereof.

Butler, *At. Gen.*, 1834, 2 Op. 693.

A naturalized citizen of the United States of Swiss origin was advised that he could not divest himself of his American citizenship by accepting the office of Swiss vice-consul at New York, but must, in order to accomplish that result, return to Switzerland with the intention to reside there, or else be naturalized in some third country.

Mr. Peshine Smith, *Solicitor of the Department of State*, to Mr. Louis Boerlin, Oct. 12, 1869, 82 MS. Dom. Let. 186.

"It is, however, by no means to be assumed that Congress and the several legislatures which assented to the fourteenth amendment contemplated that a temporary withdrawal of the person of the citizen from subjection to national jurisdiction should forfeit the rights of citizenship. Such a construction would do violence to common sense, to the customs of Americans, who, from the foundation of this Government, have been in the habit of residing in foreign countries, and engaging in commerce there, retaining their nationality; and to the

general jurisprudence of nations which recognizes such a residence as consistent with the preservation of nationality."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873,  
For. Rel. 1873, I. 256, 257.

"While expatriation may be, and sometimes is presumed from that circumstance [continued residence in another country], it is by no means conclusive of the fact. A citizen of the United States may be absent from his country for an indefinite period for purposes of education, of business or of pleasure, and so long as he does no act or assumes no obligations inconsistent with his native or acquired citizenship in this country, he is not held under our laws to have forfeited any of his rights as a citizen of the United States."

Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, June 6, 1879,  
MS. Inst. Germany, XVI. 469.

"The Department holds that for a native American to put off his national character he should put on another. Continued residence of a native American abroad is not expatriation, unless he performs acts inconsistent with his American nationality and consistent only with the formal acquirement of another nationality, and the same rule holds equally good in the case of a naturalized citizen of the United States who may reside abroad elsewhere than in the country of his original allegiance. Existing statutes confirm the principle by providing that citizenship shall flow to the children of American citizens born abroad, the birthright ceasing only with the grandchildren whose fathers have never resided in the United States. Foreign residence, even for two generations, is, therefore, not necessarily *expatriation*, in the sense of renouncing original allegiance, nor is it necessarily *re-patriation* unless through the conflict of laws of the respective countries and the conclusion of conventional agreements between them."

Mr. Evarts, Sec. of State, to Mr. Fish, chargé d'affaires to Switzerland,  
Oct. 19, 1880, For. Rel. 1880, 960.

"An American citizen may travel or reside in a foreign country indefinitely for the purposes of education, health, business, or of pleasure, and continued absence from the United States, not accompanied by any act inconsistent with his allegiance to his country, will not cause a forfeiture of citizenship. If, however, such citizen removes his family and property from the United States, enters into business and settles permanently in a foreign country, neither expressing nor manifesting by his acts any intention of returning permanently to the United States, and if under the latter circumstances he wishes the protection of this Government against the Government or laws of the country in which he has residence, it becomes a proper subject of inquiry whether he has not voluntarily abandoned his right

to such protection." Such protection may be denied, "even if he has not technically forfeited his citizenship."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, mln. to England, Feb. 27, 1884, For. Rel. 1884, 216, 218.

"As to the mere tenure of office under the Samoan government, the Department is of opinion that such tenure of office, unless it required the assumption of Samoan citizenship, could not of itself be treated as an act of expatriation, as there is nothing in the Constitution or laws of the United States that precludes a private citizen of the United States from rendering official services to foreign governments."

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, consul-general at Apia, No. 28, Jan. 6, 1888, 123 MS. Inst. Consuls, 532.

A citizen of the United States "may renounce his American citizenship, and should he desire to do so no opposition to the execution of his wishes would be proper. It is not thought, however, that his declaration that he should no longer obey any order issuing from your office, or that he would renounce his citizenship, is sufficient evidence of an actual renunciation thereof."

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, consul-general at Apia, March 6, 1888, S. Ex. Doc. 31, 50 Cong. 2 sess. 34.

### 3. OATHS OF ALLEGIANCE.

#### § 468.

"I have received the evidence transmitted by you to the Department, and have read your argument on the subject of the application of Mr. Sidney Mason for a passport. I regret not to find sufficient justification in either the facts or the arguments adduced, for a compliance with his request. By the usage of this Government, protections of the character referred to are granted to citizens of the United States alone. Evidence having been filed in this showing that Mr. Mason, whilst residing in Porto Rico, had taken the oath of allegiance to H. C. Majesty, and at the same time renounced his citizenship in this country, that rule of the Department which gives a preference to American citizens over aliens in its appointments to consulates became applicable to him, and his commission as United States consul at St. Johns was accordingly withdrawn, on the express ground of his having become a Spanish subject. The recognition of Mr. Mason now as an American citizen, by granting him a passport as such, would be in direct conflict with the decision of the Department in respect to him. Satisfied with the propriety of that decision, I can but reaffirm it by refusing Mr. Mason's passport. I will not treat alternately, as an alien and a citizen, a person

who may appear in the one or the other character as it may suit his convenience. I wish you, however, to understand distinctly that I give no opinion on the several very grave questions touched in your argument as to the right of Mr. Mason before the tribunals of the United States, in the situation in which he has been pleased to place himself. I decide on the application merely as it regards the duties of the Department of State."

Mr. Forsyth, Sec. of State, to Mr. Emerson, Jan. 23, 1839, 30 MS. Dom. Let. 138.

"Without deciding the question, whether an American citizen by taking out a letter of domiciliation in Cuba has forfeited his rights of citizenship, I think that, whilst he remains in the island, enjoying the privileges which such a letter confers, this Government is not under any obligation to protect him as an American citizen. This would seem to be clear, because in order to obtain such letter he must have promised under oath fidelity to her Catholic Majesty, and to the laws, 'renouncing all privilege, right and protection that he might claim as a foreigner, promising not to maintain any dependence, relation or subjection to the country of his birth,' &c."

Mr. Buchanan, Sec. of State, to Mr. Campbell, consul at Havana, July 26, 1848, 10 MS. Desp. to Consuls, 473.

It will be observed that Mr. Buchanan draws, in this instruction, a clear distinction between the temporary renunciation or loss of the right to protective intervention, and expatriation, in the sense of loss of citizenship.

See, however, Moore, Int. Arbitrations, III. 2701-2703; and *supra*, § 467.

In 1851, soon after the breaking up of the Lopez expedition, Mr. John S. Thrasher, a native citizen of the United States, who had lived for a number of years in Cuba, engaged in business sometimes as a merchant and sometimes as an editor, was arrested and condemned to eight years' imprisonment at hard labor on a charge of treason or conspiracy against the Crown of Spain, and was sent to Spain in execution of his sentence. In reply to a resolution of the House of Representatives requesting information concerning the case, the President transmitted a report of Mr. Webster, Secretary of State, bearing date December 23, 1851. In this report it was laid down that a citizen of the United States, residing in a foreign country, although he was bound to submit to the laws, was entitled to the interposition of his Government if he should be unjustly treated, but his situation was declared to be "completely changed, when, by his own act, he has made himself the subject of a foreign power." The question whether he had not done this was, said Mr. Webster, often a matter of presumption, but the necessity of any presumption in Mr. Thrasher's case was "entirely removed, if, in fact, he actually took out



letters of domiciliation, in order to enable him to transact business such as a Spanish subject or a domiciliated foreigner can alone transact, and actually swore allegiance to the Spanish Crown." In this relation Mr. Webster referred to the royal decree of January 17, 1815, to the royal colonization decree of October 21, 1817, and to a *bando real* issued by the governor-general of Cuba March 6, 1818, in regard to the domiciliation of aliens in Cuba. The question whether Mr. Thrasher had so domiciliated himself was not determined, but it was intimated that he had done so.

Report of Mr. Webster, Sec. of State, to the President, Dec. 23, 1851, 6 Webster's Works, 521.

See, also, Mr. Webster, Sec. of State, to Mr. Barringer, min. to Spain, Dec. 13, 1851, 6 Webster's Works, 518.

The report of Mr. Webster above cited is constantly referred to as expressing his views and those of the Government of the United States on the effect of domiciliation in Cuba as an act of expatriation. This circumstance is due to the fact that those who have dealt with the subject have usually confined themselves to the public record and have failed to examine the subsequent correspondence in the case. This correspondence was examined by J. Hubley Ashton, esq., as agent of the United States before the Mexican Claims Commission under the treaty of July 4, 1868, with the result, as shown in one of Mr. Ashton's able and learned arguments, that the report of December 23, 1851, did not represent Mr. Webster's final views on the question. On a further examination of the subject it was shown that the royal colonization decree of October 21, 1817, by which provision was made for domiciliating foreigners, was issued at the request of the civil authorities at Havana for the purpose of increasing the white population of Cuba by Spaniards from the Peninsula and Canary Islands and by emigrants from friendly European nations. Many privileges were granted to such emigrants, including exemption from taxation for fifteen years, and free exportation of the property which they brought with them if they returned to their native country at any time during the first five years; and they were, as "strangers," permitted to leave in the case of war with their native country. The domiciliary letter, which the foreigner took out, according to Spanish law, "simply authorized a foreign subject to reside in the island more than three months, and to employ himself in commerce or any other useful industry;" and it seemed, said Mr. Webster, that any conditions or restrictions introduced into the domiciliary oath inconsistent with the letter and spirit of the royal proclamation, or with the provisions of Spanish law, must necessarily be null and void. It appeared, besides, to be the general understanding of the Spanish authorities, as well as of the foreigners who took out domiciliary letters, that they did not by so doing for-

feit their rights of citizenship in their respective countries or assume any obligations inconsistent therewith. And throughout the whole Spanish law there was observed a wide distinction between domiciliation and naturalization. "Thus it appears," said Mr. Webster, "that notwithstanding the terms of the oath of domiciliation are so rigid, yet, taken in connection with the provisions of law above cited, the American residents in Cuba have never, in point of fact, regarded themselves as having changed their allegiance by taking out letters of domiciliation. They appear to have considered these letters as mere formal requisites to an undisturbed temporary residence for commercial or other business purposes. In point of fact, it is believed that these papers are usually procured by purchase, that no oath is taken, and no act done on the part of the American resident, except the payment of a small fee. Change of *domicil* is matter of intention, and, notwithstanding residence in fact, there must be the *animus manendi*. Change of allegiance, which is manifested by the voluntary action, and usually by the oath of the party himself, ought always to be accomplished by proceedings which are understood on all sides to have that effect."

Mr. Webster, Sec. of State, to Mr. Sharkey, consul at Havana, July 5, 1852, Moore, Int. Arbitrations, III. 2701-2703.

In the latter part of 1861, a native citizen of the United States, then residing with his family in England, and being the owner of several vessels then in English ports, became apprehensive of war between the United States and Great Britain. With a view to protect his property, he went to the city of Hamburg for the purpose of placing his vessels under the Hamburg flag, and in order to do this he took, in the license office of that city, the citizen's oath to be "true and faithful to the Free and Hanseatic Town of Hamburg." The oath, however, contained no renunciation of native allegiance. The affiant had no intention of remaining permanently in Hamburg, and he was in the city, unaccompanied by any of his family, only about three weeks. On these facts, Mr. B. R. Curtis, formerly a justice of the Supreme Court of the United States, gave an opinion to the effect that the person in question did not cease to be an American citizen, because (1) change of allegiance, as held in *Blight's Lessee v. Rochester*, 7 Wheat. 535, and admitted in the several opinions of the heads of Departments to the President in response to his letter of Aug. 6, 1873, can not be effected without an actual change of domicil; (2) the act of taking the oath at Hamburg did not amount to a renunciation of native allegiance, or to a declaration of a determination to remain permanently in Hamburg; (3) the naturalization treaty of Feb. 22, 1868, between the United States and the North

German Confederation, which embraced the city of Hamburg, prescribed the conditions of change of allegiance, which had not been complied with.

*Life and Writings of B. R. Curtis*, I. 438-440.

Certain gentlemen of Boston having addressed the Department of State in behalf of Mr. C. W. Adams, in respect of a claim against the United States, Mr. Seward stated that they had "unconsciously, no doubt, supposed that he is a citizen of the United States. In this they are mistaken, for this Department not only has authentic proof that he was naturalized as a citizen of Hamburg on the 17th of January, 1862, but that the Hanseatic chargé d'affaires has himself officially presented to this Department the complaint of Mr. Adams and has asked reparation therefor as one of his countrymen. In any proceeding on that subject, he must consequently be regarded as an alien."

Mr. Seward, Sec. of State, to Mr. Wilson, M. C., Sept. 9, 1865, 70 MS. Dom. Let. 330.

The Rev. Albert Whiting, a native citizen of the United States, in order to qualify himself as the pastor of a Presbyterian church in Canada, took an oath of allegiance to the British Crown. Subsequently, he gave up the charge, intending to go to China as a missionary of the Presbyterian church of the United States. With this in view, he inquired whether he would be entitled to protection as an American citizen. It appeared that the oath that he took in Canada contained no renunciation of his American citizenship, and that it did not have the effect of naturalizing him as a British subject. On these facts, the Department of State said: "If during your residence in Canada you performed no other acts incident to the character of a British subject and took no steps with the intention of renouncing your national character of a citizen of the United States, the oath which you took and subscribed on the 30th of July, 1872, does not in the opinion of this Department work a change of your nationality nor does it affect your right to protection as an American citizen."

Mr. Fish, Sec. of State, to Mr. Whiting, March 6, 1873, 98 MS. Dom. Let. 74; same to same, Feb. 6, 1873, 97 id. 427.

"Under a regulation of Great Britain operative in Canada, Americans taking public employment in the Dominion, such as teaching in the public schools, are required to take a qualified oath of allegiance to Her Britannic Majesty binding only so long as such employment continues. This oath is not held by this Government nor is it claimed by that of Great Britain to interfere in any way with their allegiance to or citizenship in the United States."

Mr. John Davis, Act. Sec. of State, to Mr. Barnett, consul at Paramaribo, Aug. 20, 1884, 111 MS. Inst. Consuls. 413,

In September, 1883, the United States consul at St. Thomas, D. W. I., brought to the attention of the Department of State the fact that the Government of Denmark required, as a condition precedent to a foreigner's entering into business in that colony, that he should take an oath of allegiance to the King of Denmark, as follows:

"I do promise and swear to bear true allegiance to His Majesty Christian the IXth, King of Denmark, as my lawful hereditary sovereign and lord, and to his hereditary successors on the throne.

"I do also promise to conform myself to the laws and ordinances of this island and to obey those who are invested here with His Majesty's authority; and lastly, to act and conduct myself in such a manner as befits a true and loyal Danish burgher and subject. So help me God and his holy word.

It was not known that this oath had been taken by any American citizens in the islands, but the Government of the United States "remonstrated against the unreasonableness and impropriety of the Danish requirement, and, while no assurances have been given by Denmark that the same would be dispensed with, there is reason to believe that the requirement is not now being enforced."

Mr. J. Davis, Act. Sec. of State, to Mr. Barnett, consul at Paramaribo, Aug. 20, 1884, 111 MS. Inst. Consuls, 413.

"I have to acknowledge the receipt of your despatch, No. 80, of the 15th of September last, stating that you had been asked by some of the agents of American vessels at Honolulu to appoint and administer the required oath to persons as masters of said vessels, who have once been American citizens, but who have taken an oath of allegiance to the King of Hawaii. You inquire whether, in view of the fact that they have taken such oath of allegiance, they are deemed to have renounced their allegiance to the Government of the United States.

"In reply I have to state that this subject, having received the careful consideration of the law officer of the Department, the Department is of opinion that the American citizens referred to assumed a qualified allegiance only to the King of Hawaii, that it continued only so long as they continued residents of that kingdom, and that it was not inconsistent with their obligations as citizens of the United States, and that such persons are competent to be masters of American vessels and to assume the obligations attaching to them in that capacity as citizens of the United States."

Mr. Hunter, Second Assist. Sec. of State, to Mr. Scott, consul at Honolulu, Nov. 1, 1876, 84 MS. Desp. to Consuls, 94.

"Your dispatch of the 5th ultimo relative to the case of Mr. Peter Cushman Jones, an American citizen resident in Honolulu, has been received.

"Mr. Jones, as it appears from his letter to you of the 26th of May, a copy of which you inclose, was born in Boston, Mass., in 1837, and in 1857 took up his residence in the Hawaiian Kingdom, enter-

ing into mercantile pursuits there as a domiciled American citizen. Becoming the owner of a merchant vessel there under the Hawaiian flag, it became necessary for him, in order to the maintenance of his rights in that Kingdom, to take an oath of allegiance to the sovereign of the islands. The form of the oath set out in Mr. Jones's letter, thus:

The undersigned, a native of the United States of America, being duly sworn, upon his oath declares that he will support the constitution and laws of the Hawaiian Islands and bear true allegiance to His Majesty Kamehameha IV.

"Your inquiry is as to what effect this proceeding may have upon the status of Mr. Jones's American citizenship.

"In becoming a citizen of the United States the law requires that an alien shall not only swear to support the Constitution and laws of this country, but also to renounce all other allegiance, and especially that of the country of which he may be then a subject or citizen. In the oath taken by Mr. Jones there is no such express renunciation of his American citizenship, nor do the circumstances manifest any intention on his part to expatriate himself.

"It may, however, at some future time, become a question for judicial investigation in his case.

"The doctrine of the executive branch of the Government on this subject is thus expressed by the Attorney-General:

"'To constitute expatriation there must be an actual removal, followed by foreign residence, accompanied by authentic renunciation of pre-existing citizenship' (8 Op. 139), and this view finds support in some judicial decisions (*Juando v. Taylor*, 2 Paine, 652).

"In the absence of a direct judicial determination of the question, I do not feel disposed to deny to Mr. Jones any right or privilege pertaining to his character of American citizenship, and therefore, while the Department will not undertake to express an authoritative opinion on the effect which his course in Hawaii may ultimately have on his *status* in that regard, you are authorized to extend to him such protection as may be properly due to a citizen of the United States residing in and having acquired a commercial domicile in a foreign state. This protection must, of course, be limited and qualified by the liabilities and obligations incident to such commercial domicile."

Mr. Frelinghuysen, Sec. of State, to Mr. Comly, min. to Hawaii, July 1, 1882, For. Rel. 1882, 346.

"Mr. Putnam . . . was instructed on the 18th ultimo that citizens of the United States who take the oath of fealty prescribed by the new constitution of Hawaii remain citizens of the United States, and are entitled to be regarded and treated as such by our consular and diplomatic officers.

"That such a result is contemplated by the Hawaiian Government

appears evident from the last sentence of the oath, which reads: 'Not hereby renouncing, but expressly reserving all allegiance and citizenship now owing or held by me.'

"This Department is informed that this oath is indiscriminately required of citizens of other nations, who are nevertheless understood by their own governments to retain their own nationality of origin. Inasmuch also as this oath is a requisite condition for exercising any political privileges on the island, it is evident that a refusal on the part of this Government of the assent to taking it granted by other governments to their citizens would result in the destruction of any political power previously possessed by our citizens and its transfer to citizens of other assenting nations.

"The Department, therefore, desires that you will consider the above instruction as addressed to yourself, and that you will relieve the minds of all *bona fide* American citizens who, while honestly desiring to retain their American nationality, are, in order to obtain the privileges necessary for a residence in the islands, obliged under local law to take an oath to support the constitution of the Hawaiian Kingdom."

Mr. Bayard, Sec. of State, to Mr. Merrill, min. to Hawaii, Sept. 30, 1887,  
For. Rel. 1888, I. 833-834.

J. F. Bowler, tried and sentenced for complicity in the attempted revolt in Hawaii in January, 1895, asked protection as a citizen of the United States. He had not taken the oath of allegiance to the Republic of Hawaii, but that Government denied his right to American protection on the ground that he was naturalized under the monarchy. Mr. Willis, the minister of the United States at Honolulu, in reporting the case, stated that section 430, Hawaiian Civil Code, provided the following oath of allegiance:

"The undersigned, a native of ———, being duly sworn, upon his oath declares that he will support the constitution and the laws of the Hawaiian Islands, and bear true allegiance to His Majesty ———, the King."

It was held by the supreme court of Hawaii that the taking of this oath naturalized the alien and admitted him to Hawaiian citizenship.<sup>a</sup>

Mr. Willis called attention to the instruction given by Mr. Frelinghuysen to Mr. Comly, July 1, 1882, in the case of P. C. Jones, *supra*.

Mr. Willis, min. to Hawaii, to Mr. Gresham, Sec. of State, Feb. 23, 1895,  
For. Rel. 1895, II. 835.

A similar case to that of Bowler was the case of C. T. Gulick, who was also arrested for complicity in the same transaction. Mr. Willis, in reporting this case, again referred to the opinion of Mr. Frelinghuysen, and cited instruction No. 61, Sept. 30, 1887, of Mr. Bayard,

“who,” as Mr. Willis observed, “seems to have based his opinion largely upon the political conditions then existing here.”

Mr. Willis also cited an opinion expressed by the Department of State, in response to an inquiry of the consul-general of the United States at Honolulu, in 1887. The consul-general, referring to the new constitution then lately promulgated by the King, and the oath prescribed in it, said:

“They [Americans in Hawaii] wish to know whether they can take the oath prescribed and retain intact their citizenship at home. The new obligation does not use the word ‘allegiance,’ as the old ‘denization’ act did, but only requires a declaration of fealty to the constitution and laws of the kingdom without relinquishing allegiance to their Government abroad. But does not the constitution and law practically constitute the Government; and is not an oath of fealty to them in reality fealty to the Kingdom? It is not a question as to their ability to throw off their Hawaiian citizenship on returning to their homes, as that has been settled by former decision, but as to whether the changed wording of the oath will permit them to exercise the privilege of Hawaiian citizenship here and at the same time be entitled to the protection accorded to American citizens. In short, can they be citizens of two countries at the same time?”

Mr. Porter, Assistant Secretary of State, Aug. 18, 1887, replied: “Citizens of the United States who take the said oath remain citizens of the United States and are entitled to be regarded and protected by you as such.”

Mr. Willis, referring to the precedents, said:

“These decisions, that without express renunciation of allegiance our citizens did not under the monarchy forfeit their right to protection, seem to be borne out by the constitutional provisions of the present Government on the subject.

“Section 2 of article 19 reads: ‘Every person receiving letters of denization shall take the oath prescribed in article 101 of this constitution, and shall thereupon be subject to all of the duties and obligations of a citizen.’ The oath mentioned is ‘to support the constitution, laws, and *Government* of the Republic of Hawaii,’ which I construe by reason of the words in italics to be equivalent to the ‘oath of allegiance,’ the taking of which made a naturalized citizen under the monarchy. That something more than this is necessary to absolve the citizen from his allegiance to his former government is shown by article 18, section 2, which requires of an alien desiring citizenship to take ‘the oath prescribed in article 101, and an oath abjuring allegiance to the government of his native land and of allegiance to the Republic of Hawaii.’”

Mr. Willis, min. to Hawaii, to Mr. Gresham, Sec. of State, No. 93, March 7, 1895, For. Rel. 1895, II. 848.

“When Mr. Bowler left this country and went to Hawaii does not appear, but on March 18, 1895, he voluntarily took an oath to support the constitution and laws of the Hawaiian Islands and bear true allegiance to the King, without expressly renouncing or reserving his allegiance to the United States. Section 432 of the statute prescribing this oath (Compiled Laws of Hawaii, 1884) provides that every foreigner so naturalized shall be deemed for all purposes a native of the islands, subject only to their laws, and entitled to their protection, and no longer amenable to his native sovereign while residing in the Kingdom, nor entitled to resort to his native country for protection or intervention; that for every such resort he shall be subjected to the penalties annexed to rebellion, and that, having been thus naturalized, he shall be entitled to all the rights and immunities of a Hawaiian subject. I am informed that the supreme court of Hawaii has held that the taking of this oath operates to naturalize the alien and admit him to full citizenship. It is not claimed that, since 1885, Mr. Bowler ever returned to the United States or resided elsewhere than on the islands.

“This Government has never held to the doctrine of perpetual allegiance; on the contrary, from its organization it has maintained that the right to throw off one's natural allegiance and assume another is inalienable. ‘Expatriation,’ said Attorney-General Black in 1859, ‘includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence.’ The effect of naturalization is to place the adopted citizen in the same relation to the Government as native citizens or subjects. The right of the Hawaiian Government, with his consent, to adopt Mr. Bowler as fully as if he had been born upon its soil is as clear as his right to expatriate himself. He manifested his intention of abandoning his American citizenship by taking the oath to support the constitution and laws of Hawaii and bear true allegiance to the King, and, so far as is known, he manifested no contrary intention before his arrest. That oath is inconsistent with his allegiance to the United States. By taking it he obligated himself to support the Government of his adoption, even to the extent of fighting its battles in the event of war between it and the country of his origin. He could not bear true allegiance to both Governments at the same time.

“The President directs that you inform Mr. Bowler he is not entitled to the protection of the United States; that in similar cases you will be guided by the views herein expressed, and that you furnish the minister for foreign affairs with a copy of this instruction.”

Mr. Gresham, Sec. of State, to Mr. Willis, min. to Hawaii, April 5, 1895,  
For. Rel. 1895, II. 853.



"Mr. Frank Godfrey, who claims to be an American citizen, has asked the intervention of our Government . . . There was . . . , as I said to him, doubt as to his right to claim protection. He has been a continuous resident of this city since March, 1879. He was a voter under the Monarchy, but claims that he declined 'several lucrative positions offered by King Kalakaua, on account of non-desire to expatriate himself.' He asserts that in 1887 and in 1891 he 'reported to the American legation for service, for which he was court-martialed in a local corps;' that in 1893, when there were rumors of an attack on United States forces, he 'reported for service under the American flag.' He exhibited copy of a letter to President Dole, of that date, informing him (Dole) of this position. In September, 1894, he was granted special 'letters of denization,' a copy of which, at his request, I inclose. Article 19 of the Hawaiian constitution refers to such letters and gives the oath required, which oath Mr. Godfrey signed, and by virtue of which he voted for members of the constitutional convention. He has held various positions under the Government, as 'clerk, proof reader, compiler, and in special service' (under the marshal), but he claims that such employments were 'temporary, none of them over three months, and that he took no oath and received no commission.'"

Mr. Willis, mln. to Hawaii, to Mr. Olney, Sec. of State, Oct. 20, 1895.  
For. Rel. 1895, II. 865. The certificate of denization was as follows:

REPUBLIC OF HAWAII.

To whom these presents shall come, greeting:

Know ye that in pursuance of the power conferred upon the executive council by the constitution of the Republic of Hawaii, all of the privileges of citizenship, including the right to vote, are by these letters of denization conferred upon Frank Godfrey, a native of the United States of America, who has resided in the Hawaiian Islands for a period of fifteen years prior to the date of the promulgation of the constitution, on the 4th day of July, A. D. 1894.

These letters are without prejudice to his native allegiance and subject to his accountability to the laws of this Republic and his performance of all the duties and obligations of a citizen.

In testimony whereof we have caused these letters to be made patent and the great seal of the Republic to be hereto affixed at the executive building this 28th day of September, A. D. 1894.

SANFORD B. DOLE,

*President.*

FRANCIS M. HATCH,

*Minister of Foreign Affairs.*

J. A. KING,

*Minister of Interior.*

J. M. DAMON,

*Minister of Finance.*

WILLIAM O. SMITH,

*Attorney-General.*

[GREAT SEAL.]

"I quite agree with you as to the questionable nature of this claim upon its merits, even were Mr. Godfrey's right to claim protection established. It appears, however, from your relation of his statements and from the annexed copy of the certificate of denization granted to him, that his case is indistinguishable from those of other American citizens who have acquired local citizenship in Hawaii. Under the decisions of my predecessor, his taking the oath and voluntarily subjecting himself to accountability to the laws of the Hawaiian Republic and to performance of all the duties and obligations of a citizen thereof constitute naturalization for all Hawaiian purposes while within Hawaiian jurisdiction, and the phrase that 'these letters are without prejudice to his native allegiance' can have no significance either as to his status within Hawaiian jurisdiction or as to his status within the jurisdiction of the United States should he return hither, for in the latter case it would be determinable by the laws of this country and not by any administrative act of Hawaii."

Mr. Olney, Sec. of State, to Mr. Willis, min. to Hawaii, Nov. 13, 1895,  
For. Rel. 1895, II. 867.

"I have to acknowledge receipt of your No. 27, Diplomatic Series, of the 15th September inquiring as to your proper treatment of the cases of certain citizens who, having emigrated to Liberia and acquired the rights of citizenship in that Republic, still claim that they are citizens of the United States.

"From your statement it appears that the Liberian Government does not require colored persons going from the United States to that Republic to renounce their allegiance to the Government of the United States or to take out naturalization papers, as is required in the case of immigrants from other countries, but that the fact of such a colored citizen of the United States taking out an allotment of land enables him to be regarded for all national purposes as a Liberian citizen.

"Analogous questions have arisen in the past regarding the status of American citizens resorting to Hawaii, the Danish island of St. Thomas, and other localities where an alien taking up local residence was, under certain formalities, admitted to all rights of citizenship without requiring abjuration of the allegiance of origin. In the case of Hawaii the formal act of admission to citizenship and the oath taken by the applicant purported to preserve the original allegiance for all effects not connected with domicile in Hawaii. Mr. Secretary Gresham, and after him Secretaries Olney and Sherman, held that an American so naturalized in Hawaii effectively lost his United States citizenship.

"In the case of an American in Liberia, which you report, the omission of an oath of allegiance or requirement of formal naturalization, constituting a peculiar exception in favor of American citizens, would at first sight appear to modify the principle involved in the Hawaiian decision. In fact, however, the principle involved is substantially the same. The Republic of Liberia is an independent sovereignty, in no wise bound to or dependent upon the United States, and, theoretically at least, it is within the range of possibilities that differences might arise between the two governments leading even to rupture of relations. It is inconsistent for an individual to bear true allegiance at the same time to two different sovereigns, and the exercise of the rights of citizenship under any alien sovereignty must be regarded as a voluntary assumption of the obligations of allegiance to such sovereignty.

"As a doctrine, therefore, it may be said that when a citizen of the United States acquires, by whatever process, the status of a Liberian citizen he performs an act incompatible with his allegiance to the United States and with his citizenship thereof.

"Nevertheless, the facts are not before this Department with sufficient clearness to enable it to lay down a rule designed to cover every case of the character you suggest which may arise in Liberia. Should any case actually arise, the particular facts and circumstances attending it should be reported to the Department for its decision."

Mr. Hay, Sec. of State, to Mr. Smith, min. to Liberia, No. 20, November 6, 1898, MS. Inst. Liberia, II. 346.

#### 4. MILITARY SERVICE.

#### § 469.

Merely entering into the military or naval service of a foreign sovereign does not by itself work expatriation.

*Santissima Trinidad*, 1 Brock. 478; 7 Wheat. 283.

A native of the United States, naturalized as a citizen of Mexico, did not forfeit his right, under a grant from Mexico, to lands in California, by afterwards joining the forces of the United States in the war by which that territory was acquired.

*United States v. Reading*, 18 How. 1.

Under the declaration adopted by the convention of Texas, November 7, 1835, promising citizenship and donations of land to all volunteers in her war for independence, a citizen of Illinois, who afterwards entered her army as a volunteer, and who died in her service, became a citizen of Texas, and his wife's citizenship followed his, though she never came to Texas.

*Kircher v. Murray*, 54 Fed. Rep. 617.

“Mr. Jefferson, when Secretary of State, in his letter to Gouverneur Morris of the 16th of August, 1793, speaking of the right of private citizens to make war upon a country with which the Government of the United States is at peace, says: . . .

“It has been pretended, indeed, that the engagement of a citizen in an enterprise of this nature was a divestment of the character of citizen, and a transfer of jurisdiction over him to another sovereign. Our citizens are certainly free to divest themselves of that character by emigration, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit that the bare commission of a crime amounts of itself to a divestment of the character of citizen, and withdraws the criminal from their coercion. They would never prescribe an illegal act among the legal modes by which a citizen might disfranchise himself; nor render treason, for instance, innocent, by giving it the force of a dissolution of the obligation of the criminal to his country.”

“This is in accordance with the opinion of the circuit court of the United States for Pennsylvania, by whom it was stated, in 1793, that, ‘if one citizen of the United States may take part in the present war, ten thousand may. If they may take part on one side, they may take part on the other; and thus thousands of our fellow-citizens may associate themselves with different belligerent powers, destroying not only those with whom we have no hostility, but destroying each other. In such a case, can we expect peace among their friends who stay behind? And will not a civil war, with all its lamentable train of evils, be the natural effect?’”

Report of Mr. Webster, Sec. of State, to the President, in Thrasher's case.  
Dec. 23, 1851, 6 Webster's Works, 521, 527.

“In reply to your note dated the 21st inst., I have to inform you that it appears from the report of the American commissioners in the Robinson case, to which you allude, that the only question discussed was that of jurisdiction. It appears to have been contended by the Mexican commissioners that Robinson parted with his nationality on taking a commission in the Mexican army, and therefore his legal representatives could not prosecute his claim before the board. The American commissioners, however, decided that Mrs. Robinson, in whose name the claim was prosecuted, was an American citizen, and that therefore the case came within the jurisdiction of the board. It does not appear that the claim was resisted on its merits.

“The decision of the umpire was that the board had no jurisdiction of the case.”

Mr. Thomas, Assist. Sec. of State, to Mr. Brodhead, M. C., July 23, 1856,  
45 MS. Dom. Let. 403, referring to the proceedings of the mixed com-

mission under the treaty between the United States and Mexico of 1839. For the history of the commission, see Moore, *Int. Arbitrations*, II. 1220-1232.

Enlistment in the military or naval service of a foreign power is not of itself a renunciation of American citizenship.

Mr. Hunter, Second Assist. Sec. of State, to Mr. Green, consul at Cordoba, Arg. Rep., Sept. 10, 1880, 97 MS. Desp. to Consuls, 264.

"It appears that, after lending important services to the republicans of Mexico during the French intervention and the Empire of Maximilian in 1866-'67, Mr. Smith took active part in 1876 in the successful revolutionary movement of General Diaz, became a colonel in the Mexican army, and was understood to be in such service at the time of his death, of which the date is given as June 5, 1879.

"You further quote the provision of the Mexican law of January 30, 1856, enacting the naturalization, apparently without any additional formality beyond the fact of service, of a foreigner who 'accepts any public office of the nation, or belongs to the army or navy,' and in view of this you ask in general terms for the views of the Department upon the status of Americans accepting service under the Mexican Government, and also specific instructions on the points presented in Mr. Strother's letter to you of the 15th ultimo, a copy of which you transmit.

"In answer to the first point presented by you, I may observe that on the 27th of July, 1868, Congress declared that the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of 'life, liberty, and the pursuit of happiness.' (Section 1999, Revised Statutes.) The act of changing allegiance and citizenship must necessarily conform to the laws of the country where the American who voluntarily expatriates himself becomes a citizen or subject. No law of the United States, for instance, can make a Mexican citizen out of one of our own citizens, or prevent him from becoming a Mexican citizen by the operation of Mexican law. Mr. Smith, by the act of voluntarily taking military service under the Government of Mexico while a law was in existence by which such an act on his part conferred and involved the assumption of Mexican citizenship, must be deemed to have understandingly conformed to that Mexican law, and of his own accord embraced Mexican citizenship. Under the enactment of Congress, previously quoted, no permission of the Government of the United States is necessary to the exercise of the right of expatriation."

Mr. F. W. Seward, Act. Sec. of State, to Mr. Foster, min. to Mexico, Aug. 13, 1879, For. Rel. 1879, 824.

To the inquiry whether an American citizen, by enlisting in the military service of a foreign prince, would lose his national character as a citizen of the United States, the following answer was made: "Volun-

tary enlistment in the military service of a nation is one of the highest proofs that a man can give of allegiance and fidelity to that power, and is always accepted as a renunciation of his former nationality unless such service is undertaken with the express permission of his own Government. In regard to your further inquiry as to how far this Government might be disposed to interfere in behalf of such person, were his life in danger as a captive to the enemy of the prince in whose service he was, the Department can not undertake to answer that question in advance of an actual case presented with all its attending facts and circumstances." (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Thomas, May 5, 1877, 118 MS. Dom. Let. 151.)

"I have received your despatch No. 172, of the 28th ultimo, relative to the case of William Sherwell, an American citizen, who has applied to you for protection on account of cruelty and ill treatment which he has suffered at the hands of local authorities at Orizana, State of Vera Cruz, where he resides.

"I desire to approve your unofficial presentation of the case to Mr. Mariscal, and your intimation to him that the United States could not accept his theory that because Mr. Sherwell had served in the Mexican army he had thereby placed himself beyond the pale of United States protection. . . . You will find not only a mass of unpublished correspondence in the archives of your legation showing this Government's position under such circumstances, but the Foreign Relations of 1882, 1883, 1884, 1885, and 1887 may also be profitably consulted in this respect.

"This Government maintains that naturalization is a voluntary act, not to be imputed or determined by construction, but to be affirmatively performed by the individual. While it does not deny that a citizen may voluntarily divest himself of his allegiance and acquire a new one, and while it also recognizes that there are certain specific acts which he may perform in a foreign state, and which in themselves are tantamount to a voluntary and open renunciation of his former nationality or allegiance, yet manifestly the allegation of the Mexican Government in Mr. Sherwell's case is not of this nature. A foreign municipal law can not divest an American citizen *ipso facto* of his allegiance on the ground of his having performed duty in the military service of an alien state, or of having acquired title to real estate under the laws of such state, or of being employed by a chartered corporation thereof.

"Besides these generally recognized principles of international usage, there are historical precedents which emphasize the position of this Government in respect of its citizens temporarily abroad.

"As evidence of this it may be stated that entering the military service of a foreign state is by itself in no sense an abjuration of prior nationality. In our Revolutionary war over six thousand Frenchmen were enlisted in our armies, either in our marine forces

or as auxiliaries, but the cases in which those thus serving accepted an American nationality were very few. This Government never maintained, nor did France ever concede, that this enlisting into our service had any effect on their nationality; and France afterwards made several applications to this Government through her diplomatic representative for relief to such of those French subjects as, after their return, had claims against the United States. La Fayette was a major-general in our service, but during the diplomatic controversies that arose as to him subsequently, when he was a prisoner in Austria, this Government never claimed that he was a citizen of the United States or that he ever ceased to be a Frenchman. The same may be said of the Orleans princes, who joined General McClellan's army during the late war of the rebellion. An interesting case to the point is that of late Prince Imperial of France, who died fighting in the English service, but whose political status was treated in England as French. Still another striking proof of the general acceptance of this rule is the fact that there are now thousands of foreigners residing in the country of their original allegiance who receive pensions for their services to the United States as soldiers of the late civil war, although they were never naturalized citizens of the United States. Not only did these pensioners never claim that they had become citizens of the United States by their enlisting, but in no case did their home sovereigns, so far as this Department is advised, either object to their enlisting in our armies or claim that by such enlistment any change was effected in their allegiance or their right to protection based on that allegiance.

"To sum up, therefore, as a general rule it may be maintained that the mere fact of entering into a foreign military service does not divest either nationality or domicile."

Mr. Bayard, Sec. of State, to Mr. Whitehouse, chargé at Mexico, No. 166, Nov. 14, 1888, MS. Inst. Mexico, XXII. 300.

"Citizens of the United States do not lose their nationality by enlisting in foreign armies."

Mr. Rives, Assist. Sec. of State, to Mr. Putnam, consul-general at Honolulu, Jan. 5, 1888, For. Rel. 1895, II. 850.

"I have the honor to enclose a copy of my reply to your telegram of yesterday, by which I informed you that service in the English army would not deprive a native American of citizenship, and that he remains a citizen unless formally naturalized in England."

Mr. Foster, Sec. of State, to Mr. Hawley, U. S. S., Nov. 1, 1892, 189 MS. Dom. Let. 42.

An inquiry having been made whether a citizen of the United States engaged in mercantile business in Nicaragua had forfeited his

American citizenship in consequence of his having accepted a commission to the Nicaraguan army, to aid in the suppression of a rebellion against the Government, the Department of State said: "There is no statutory provision determining the circumstances under which a citizen of the United States may forfeit his nationality. Should the circumstances of a citizen's accepting military or civil office under a foreign government make him, under the law of the foreign country, a citizen thereof, the act would be deemed a voluntary abandonment of his American status and an assumption of another allegiance."

Mr. Hay, Sec. of State, to Mr. Turley, April 6, 1899, 236 MS. Dom. Let. 186.

#### XIV. RENUNCIATION OF NATURALIZATION.

##### 1. GENERAL PRINCIPLES.

##### § 470.

"There can be no doubt that, on the same principle which admits of aliens being naturalized in the United States, they may afterwards cast off the character of American citizen and resume their former allegiance or take that of any other country. In case of return to the British dominions, under the circumstances which the first question comprehends, and as the doctrine of perpetual allegiance is there maintained, it is highly probable that our tribunals would adjudge the loss of citizenship to be incurred."

Mr. Madison, Sec. of State, to Mr. Murray, June 16, 1803, 1 MS. Desp. to Consuls, 168.

"A vessel is not entitled to be documented as a vessel of the United States, or, if so documented, to the benefits thereof, if owned, in whole or in part, by any person naturalized in the United States and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless in the capacity of a consul or other public agent of the United States."

Treasury Regulations, 1884, p. 5; Rev. Stat., § 4134; act of March 27, 1804, 2 Stat. 296.

"From the documents transmitted with your despatch No. 24, it appears that Mr. Filippi [a native of Italy] was naturalized as a citizen of the United States in the year 1807, and that in the same year he left this country. There is nothing to indicate any intention on his part of returning here, or that he has any tie of interest or of social connection linked with the welfare of this nation. Without recurring to the litigious question, how far his rights as a citizen might be affected in the judicial tribunals of this country, by such a long and continued absence following almost immediately after his



naturalization, it must be obvious that the obligations of the United States to protect and defend the interests of such a person, in controversies originating in foreign countries, and against the rights of their jurisdiction, can not be supposed to bind them to the same extent at which it might be proper to interpose in behalf of our resident or native citizens. Whatever imperfections may be supposed to exist in the modes of administering justice at Tunis, a merchant who, in the exercise of his own discretion, engages in commercial speculations there must be prepared to take the chances of arbitrary decision to which they are liable, nor is it consistent with any principle of natural or national law, that a country, with which a merchant has no other relation than that of his having once obtained an act of naturalization from its records, should be involved in contest and perhaps entangled in war with another nation for the settlement to his satisfaction of his private transactions of trade."

Mr. John Quincy Adams, Sec. of State, to Mr. Shaler, consul-general to Algiers, No. 1, Jan. 13, 1818, 2 MS. Desp. to Consuls, 85.

"They [the United States] have no means of judging of the merits of the controversy, as a question between individuals; neither is it understood that a foreigner, altho' once naturalized as a citizen of the United States but having long since finally left this country without intention of returning to it, can claim the protection of this nation in the states of Barbary. Should any question in this case hereafter occur, it is to be distinctly stated that it is one in which the Government of the United States has taken no part, has no concern, and will not suffer to be made the occasion of any demand from the Bey whatever." (Mr. Adams, Sec. of State, to Mr. Stith, consul at Tunis, May 27, 1819, 2 MS. Desp. to Consuls, 164.)

"After his naturalization here, if indeed he was naturalized, he returned to his native country to reside (for Cuba is a part of Spain), went into public employment there, and reestablished his domicil. His native allegiance may therefore be considered as having reverted. Spain could well claim him as one of her subjects, and treat him as such, without the United States being in a condition, if they had the disposition, to question her right to do so."

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII. 54.

"Mr. Webster states: 'It can admit of no doubt that the naturalization laws of the United States contemplate the residence in the country of naturalized citizens, unless they shall go abroad in the public service or for temporary purposes.' In this opinion I fully concur."

Mr. Seward, Sec. of State, to Mr. Marsh, min. to Italy, Jan. 21, 1863, MS. Inst. Italy, I. 171, referring to the return of naturalized American citizens of Italian origin to their native country "with the evident intention of taking up their abode" there.

The passage quoted from Mr. Webster is in Mr. Webster, Sec. of State, to Mr. Porter, min. to Turkey, Aug. 26, 1842, MS. Inst. Turkey, I. 295.

“If a Prussian subject after having been naturalized as an American citizen resumes his permanent residence in his native land we cannot deny that he also resumes his original allegiance and loses his quality of American citizen. If it is his intention permanently to reside in Prussia the obligations of a Prussian subject attach to him the moment he touches the Prussian territory. What the intention is must be gathered from facts.”

Mr. E. Peshlne Smith, examiner of claims, to Mr. Hance, Jan. 21, 1867, 75 MS. Dom. Let., 185.

“Naturalization is intended for the benefit of those who have the intention of residing at present and not prospectively in the United States.”

Mr. Fish, Sec. of State, to Mr. Redmond, April 3, 1869, 80 MS. Dom. Let., 530.

“If Mr. Medina was ever a citizen, which appears to be doubtful from the records of this Department, he has lost his citizenship by accepting office from his native country. The passport cannot be renewed.”

Mr. J. C. B. Davis, Assist. Sec. of State, to Mr. Weile, consul at Guayaquil, April 18, 1870, 57 MS. Desp. to Consuls, 300.

“In respect to naturalized citizens of the United States, resident in Ecuador, but not natives of that country, who left this country under circumstances indicating that they obtained naturalization, not with a view to permanent residence here, but for the purpose of claiming the protection of this Government in foreign countries, the reasoning and the instructions contained in the circular of October 14, 1869, are applicable in a general sense. They have not, however, quite the same force and emphasis as in the case of naturalized citizens returning to the country of their native allegiance. There is not the same presumption that when they go to their native land it is with the intention of establishing an abiding domicile. Moreover, the Government under whose jurisdiction they dwell cannot claim, as in the other case, that they revert to their native allegiance, but can only claim that local and temporary allegiance which every one owes to the Government whose protection he enjoys.”

Mr. Fish, Sec. of State, to Mr. Wing, Apr. 6, 1871, MS. Inst. Ecuador, I. 263. For an extract from the circular of Oct. 14, 1869, see Mr. Fish, Sec. of State, to Mr. Motley, min. to England, *infra*, § 475.

Where the subject is not regulated by treaty, no distinction can be made, with respect to protection abroad, between naturalized and

native-born citizens of the United States. The domiciliation of a naturalized citizen of the United States in his native country would not of itself deprive him of his right to the protection of this Government.

Williams, At. Gen., 1873, 14 Op. 295.

For discussion of the naturalization laws of the United States, see 1 Phillimore, Int. Law (3d ed.), 451; Lawrence, Com. sur Droit Int., III. 196.

“Continuous absence from this country does not necessarily presume expatriation. It has always been held to be consistent with a purpose of returning; and in the case of a natural-born citizen, or of a naturalized citizen, so residing in any country, except the country of his nativity, this Department would require its agents to extend the protection of the Government to all citizens, except in the presence of strong affirmative proof of a purpose of expatriation. But when a naturalized citizen returns to his native land to reside, the action of the treaty-making power above referred to would seem to require that such agents be jealous and scrutinizing when he seeks their intervention. Even in such case the purpose of not renouncing the adopted citizenship might be manifested and proved in various ways, such as the payment of an income tax when such a tax was imposed, the maintenance of a domicil, and the payment of taxes on personal property within the United States, or other affirmative action.

“It is the duty of the diplomatic and consular agents of the United States to listen to all facts which may be produced tending to exclude the presumption of expatriation, and to give to them the weight to which in each case they may be entitled.”

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 260.

“I am of opinion that the entrance into the civil service of the country of his nativity by a naturalized citizen of the United States, who has returned to that country, and continues his residence there beyond the length of time at which, by convention between the two States, the intent not to return to the country of adoption may be held to exist, must be taken to be very strong ‘evidence of the absence of intent to return,’ and must raise a presumption, which might, and probably would, make it very difficult for the country of adoption to assert the continued citizenship of the party thus taking service and continuing to reside in the country of his nativity.”

Mr. Fish, Sec. of State, to Mr. Müller, Jan. 28, 1874, 101 MS. Dom. Let. 222.

A naturalized citizen of the United States can not be regarded as renouncing his United States citizenship merely because he returns to his native land. To sustain such renunciation, there must be either an

express declaration of renunciation, or acts from which it may be logically inferred.

Mr. Frelinghuysen, Sec. of State, to Mr. Osborne, June 19, 1882, MS. Inst. Arg. Rep. XVI. 238; same to same, July 18, 1883, id. 275.

Payment of taxes in the United States by a naturalized absentee, on his interest in a business agency there, such payment being made by him as a trader and not as a citizen, will not sustain a claim of retention of American nationality.

Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, No. 12, Nov. 14, 1882, MS. Inst. Switz. II. 152.

“There may be circumstances that amount to a renunciation of the citizenship acquired by naturalization; returning to the country of one's nativity to reside there and continuing such residence there for an indefinite time, without manifesting any intention to return to the United States, would be evidence tending to show an intentional surrender of the rights of American citizenship.”

Mr. Frelinghuysen, Sec. of State, to Mr. Herdocia, Dec. 8, 1882, 144 MS. Dom. Let. 623

Abandonment of naturalization in the United States may be inferred from a protracted stay in the country of origin after returning there, coupled with proof of *animus manendi*, and of entering on political duties in the latter country.

Mr. Davis, Acting Sec. of State, to Mr. Taft, Jan. 18, 1883, MS. Inst. Austria, III. 224.

In 1883 “a native-born citizen of the Argentine Republic who had come to the United States many years before and been naturalized here, returned to his native country and resided there for a number of years without intention, expressed or manifested, of returning to this his adopted country. He sought the protection of this Government, but it was held that the facts were sufficient to show that he had resumed his native allegiance to the Argentine Government and he was not entitled to the protection of this country.”

Mr. J. Davis, Act. Sec. of State, to Mr. Barnett, consul at Paramaribo, Aug. 20, 1884, 111 MS. Inst. Consuls, 413.

“Nor does this Government concur in the proposition that a naturalized citizen of the United States can have such citizenship extinguished solely by residence, however protracted, in the country of his origin. The question of his loss of such citizenship is to be determined by the intent of the party, to be inferred from his acts and all the surrounding circumstances of the case, and is not to be conclusively settled by mere lapse of time or term of residence in the

country of his origin. We maintain this as a rule of international interpretation of naturalization treaties, and in the case of Germany have lately held that two years' stay creates only a presumption of abandonment of the acquired citizenship, which is open to rebuttal."

Mr. Bayard, Sec. of State, to Mr. Winchester, May 17, 1886, MS. Inst. Switzerland, II. 311. See, also, Mr. Porter, Acting Sec. of State, to Mr. Curry, min. to Spain, Jan. 4, 1886, *infra*, § 475.

"Your dispatch, No. 193, of the 1st instant, in reference to the application of Albert Landau for a passport, has been received.

"In the attached memorial Mr. Landau alleges that he was duly naturalized in Philadelphia during the year 1854, and that subsequently in the same year, having obtained a passport from this Department, he returned to Europe. During the following year, it is alleged, he lost both his record of naturalization and his passport, but obtained another passport from the legation at Constantinople. This was subsequently canceled when a new passport was given him by the consul-general at Alexandria, Egypt, in 1863; the latter passport he is unable to produce. He has not, apparently, visited the United States since 1854. He now desires a new passport to be issued to him by your legation.

"It is not necessary to consider whether naturalization can be proved by parole, in case of destruction of the record, for in this case there is no adequate proof that the record of naturalization ever existed. But even supposing that Mr. Landau's naturalization were duly proven, I hold that he is not now entitled to a passport. He was naturalized, so he claims, in 1854, at Philadelphia. He was in the Levant in 1857, and there amassed a fortune, with which, about 1868, he retired to Vienna. During the whole of this period, according to his own statement, he was absent from the United States. This absence, therefore, commencing almost at the instant of his naturalization, continued over thirty-four years, during which time he performed none of the duties, nor made any of the contributions, of a citizen to the support or welfare of the country of his adoption, although during a portion of that time all the resources of that country were severely drawn upon. Had he paid an income tax, as by law he should have done if he retained his citizenship during the period when that tax was imposed, it would be easy for him to establish such payment. No attempt has been made to do so, and we must therefore presume that no such tax was paid. Had he paid taxes to the State of Pennsylvania, in which it is to be inferred from his statements he claims to have been domiciled, this also could be easily proved; and that no such proof is offered justifies the presumption that none of such taxes were paid. He keeps exempt from all taxation in this country the wealth he has accumulated, under

the protection of a passport and alleged citizenship of this Government, and he thus stands aloof, demanding the protection of allegiance while abandoning all its duties, and, from a foreign land, applies to this Government for a passport which, without his performing any of the duties of a citizen of the United States, would relieve him, so far as the interposition of the United States could do so, from the duties of a subject of Austria. This is not a case in which the United States can or ought to interpose. If Mr. Landau had ever any title to be considered a citizen of the United States, he has abandoned it. Citizenship of the United States, it is my duty to say, is a high privilege, and, when granted to an alien, confers great prerogatives, whose maintenance, when they are honestly procured and faithfully exercised, the United States will exert its fullest powers to vindicate. These prerogatives are granted to protect, not merely men of wealth, such as the present memorialist, but the humblest and most friendless immigrant who seeks shelter and a home on these shores. But the enjoyment of the prerogatives is conditioned on the performance of the correlative duties of loyal service, of love to the country of adoption, of support of the country when she needs support, and of payment of the just taxes that country imposes upon all its citizens. When the performance of that duty ceases, then cease the prerogatives of the citizenship on which they are conditioned. As far as I can judge from what is before me in the present case, these duties of citizenship have been steadily evaded by nonresidence and have never been performed by the memorialist. Whatever may have once been his title to citizenship, it was long since abandoned by him. His application for a passport should, therefore, be refused."

Mr. Bayard, Sec. of State, to Mr. Lee, chargé at Vienna, July '24, 1886, For. Rel. 1886, 11.

Hercules A. Proios was naturalized in the United States August 14, 1871. The date and place of his birth and the time of his coming to the United States were uncertain. In a passport application made in 1871 he stated that he was born in 1844. In an application made in 1887, he gave the date of his birth as 1840. In his application of 1871 he stated that he was a native of Greece, but there was other evidence that tended to show that he was born in Constantinople of Greek parents. The precise time of his departure from the United States was uncertain, but it appeared that it was soon after his naturalization. After his return to Turkey he remained there continuously till 1887, a period of from fourteen to sixteen years, when he settled himself as a ship-chandler in southern Russia. While in Turkey he was employed in an institution under the jurisdiction of the Government. He was not a member of any American community in that country, nor connected with any American interests there or

elsewhere. He had manifested no intention to return to the United States, and the consul-general at Constantinople reported that he had told him that he did not intend to return to America. Upon these facts, it was held that he had abandoned his American naturalization, and the legation and consulate-general of the United States at Constantinople were instructed to decline to visé his passport or further to recognize his claim to American citizenship.

Mr. Rives, Assistant Sec. of State, to Mr. Prolos, Oct. 25, 1888, For. Rel. 1888, II. 1620.

Dr. Dongian, a native of Turkey, who had been naturalized as a citizen of the United States, returned to Turkey, and, ostensibly with a view to facilitate his admission to practice medicine, permitted himself to be registered by the Bureau of Nationality as an Ottoman subject, at the same time surrendering to the bureau his American passport. He afterwards invoked the aid of the American legation to cause the delivery of his certified diploma to him as a citizen of the United States, and explained that he had regarded his previous action as an empty formality, "merely dictated by expediency, his intention always being to resume his acquired American citizenship." The legation, however, required him to surrender his certificate of naturalization, and sent it to the Department of State. The Department approved the legation's action, and notified the court by which the naturalization was granted, with a view to prevent him from obtaining a duplicate certificate.

Mr. Wharton, Act. Sec. of State, to Mr. Hirsch, July 10, 1891, For. Rel. 1891, 752.

A report of the consul at Stuttgart that Hugo Brudi, a naturalized citizen of German origin, had signified his intention of renouncing his American citizenship, was sent to the naturalizing court. (Mr. Cridler, Third Assist. Sec. of State, to Clerk of the Court of Common Pleas at Philadelphia, Nov. 16, 1897, 222 MS. Dom. Let. 468.)

It appearing that a native of Nicaragua, who had been naturalized in the United States, had afterwards resumed his residence in his native country and held there for a brief term the office of alcalde, the Department of State said: "It is probable that in accepting office he was required to subscribe to an oath to support and defend the constitution of Nicaragua and uphold its laws. This seems certainly to imply citizenship, if indeed it is not tantamount to a renunciation of his acquired allegiance." It was ascertained that such an oath was taken, the precise form being "to obey and cause to be obeyed the constitution and the laws." It was decided that the "nature of the oath" was "conclusive against the issuance of a passport."

Mr. Wharton, Acting Sec. of State, to Mr. Shannon, min. to Nicaragua, March 1, 1893; Mr. Gresham, Sec. of State, to Mr. Baker, min. to

Nicaragua, May 17, 1893, For. Rel. 1893, 183, 185. As the issuance of a passport was the only question before the Department, the broader question of renunciation of acquired allegiance was not definitely decided.

The Government of Colombia maintains that nationality acquired by naturalization in another country is lost by the individual subsequently becoming domiciled in his native country.

For. Rel. 1894, 196.

Adam Aivazian, a native of Turkey, was naturalized at Fresno, California, April 20, 1890, after having resided in the United States about eight years. Immediately after his naturalization he obtained a passport, and, returning to Turkey, settled near Yozgad, where he married, purchased a dwelling, and engaged in trade. In 1894, during the Armenian troubles, he was arrested, tried by court-martial, and sentenced to ten years' imprisonment, with transportation, on a charge of having forcibly aided a condemned Armenian brigand to escape. The grand vizier was unwilling to allow any foreigner to go to Yozgad, owing to the disturbed condition of the town, but had him brought to Constantinople, where the secretary of the American legation saw and conversed with him. On his own statements, and what could be learned from other sources, the existence of an intention to return to the United States was uncertain. The legation was instructed "to investigate this case, and, should Aivazian's conservation of the rights of American citizenship not be established, to inform the Turkish minister for foreign affairs that this Government would not accord to him the privileges and protection it cheerfully accords to both its native and naturalized citizens."

Mr. Gresham, Sec. of State, to Mr. Terrell, mln. to Turkey, Aug. 27, 1894, For. Rel. 1894, 779.

Aivazian was afterwards pardoned and discharged. (For. Rel. 1894, 780.)

If the circumstances of return of a naturalized citizen of the United States to the country of his origin are such as to indicate "a definitive abandonment of residence and domiciliary or representative business interest in the United States" and a resumption of domicile in the country of origin, the "effective renewal of the original status may take place immediately upon the return to that country." The same thing occurs where a naturalized citizen goes to a country other than that of his origin with the intention to reside there permanently, but the presumption of such an intention is not so strong as in the case of a person returning to the country of his origin.

Mr. Adee, Act. Sec. of State, to Mr. Little, consul at Tegucigalpa, July 13, 1895, For. Rel. 1895, II. 935-937.



In the case of a native of Turkey, who reentered his native land as a Turk and accepted a local passport as a Turkish subject, his course was declared to amount to "an act of voluntary repatriation by which he released himself from any further claim of the United States upon his allegiance, and renounced all claim to the protection of his Government."

Mr. Adee, Acting Sec. of State, to Mr. Dickinson, No. 29, Sept. 3, 1898, 163 MS. Inst. Consuls, 508.

The precise point of the instruction was the approval of the action of the consul-general at Constantinople in refusing to visa the individual's American passport.

Ablahat Odishu Samuel resided in the United States from 1893 to 1896. From 1896 to 1899 he lived abroad. From 1899 to 1901 he again resided in the United States, and obtained a certificate of naturalization. He then returned to Persia, and was still residing there when, in January, 1904, he applied for an American passport, to include two children, who were born in Persia. The action of the American minister at Teheran in refusing to issue the passport was approved, on the strength of the provisions of the circular of March 27, 1899, with regard to loss of the right to protection through permanent residence abroad. The provisions of the same circular were also cited, to the effect that the natives of semibarbarous countries, or of countries in which the United States exercises extraterritorial jurisdiction, who have been naturalized in the United States, are subject to all the restrictions of the circular with regard to permanent foreign residence on returning to their country of origin.

\* For. Rel. 1904, 656. For the circular of March 27, 1899, see *infra*, §§ 517, 519, 522.

## 2. GERMAN TREATIES.

### § 471.

"3. If a German naturalized in America renews his residence in North Germany without intent to return to America, he shall be held to have renounced his naturalization in the United States. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. The same provision applies to Württemberg as to a 'Württemberg,' to Hesse Darmstadt as to a 'Hessian naturalized in America but originally a citizen of the part of the Grand Duchy not included in the North German Confederation;' to Bavaria as to a 'Bavarian,' but as to the latter power it is declared that the article 'shall only have this meaning, that the adopted country of the emigrant can not prevent him from acquiring once more his former citizenship;

but not that the state to which the emigrant originally belonged is bound to restore him at once to his original relation.' As to Baden, it is only provided that the emigrant from the one state who is to be held as a citizen of the other state, shall not on his return to his original country be constrained to resume his former citizenship; yet, if he shall, of his own accord, reacquire it and renounce the citizenship obtained by naturalization, such a renunciation is allowed, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country.

"Here, again, we find great defects, which it is very desirable to have remedied.

"(a) The provisions respecting residence in the old country and the reacquisition of citizenship are unequal, and in the case of Bavaria uncertain.

"(b) Residence in other parts of Germany than that covered by the provisions of the particular treaty is inoperative to work a loss of the acquired citizenship, which is against the interests and the real intention of the United States and of Germany."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, April 14, 1873,  
For. Rel. 1873, I. 280.

"As it regards recovering German citizenship by a German who has become naturalized in America, all the powers have thus far acted upon the same rules. It is agreed that a German who has once passed out of his connection with a German State cannot become again a German citizen without some express choice of his own, and without the consent of the government.

"A. With regard to the reacquisition of citizenship the German States exercise only the same power which we exercise. We naturalize Germans after a short residence, if they serve in the Army or Navy, but that binds us only, and so it is with the German States.

"B. So long as Bavaria, Würtemberg, and the rest were independent powers, the residence of a naturalized American there had just the same effect as if he had resided in Belgium or Holland. Now that they form part of the German Empire, no case has come, or is likely to come up, that involves the question whether the union brings with it a change in this respect. In practice it would be as easy to pass, for example, from Baden to Switzerland, as from Baden to Würtemberg; and so of the other powers, if the evasion of the treaty which is suggested is desired. So this point will never be of practical importance. I cannot see how American interests are thereby exposed to injury; because America, like Germany, always retains the power for itself to decide what length of absence, if any, shall forfeit American citizenship."

Mr. Bancroft, min. to Germany, to Mr. Fish, Sec. of State, May 8, 1873,  
For. Rel. 1873, I. 284, 289.

"A German can now come to America, obtain his naturalization papers through the operation of our laws, return to Germany and reside there indefinitely as an American citizen, provided he does not reside the requisite time for renunciation in the territories under the jurisdiction of the particular power of whom he was formerly a subject. It is true that such a course would be a fraud upon the United States, and a fraud upon the German Empire. We should be deprived of the resources of the naturalized citizen towards the support of the state; Germany would be deprived of the right to call upon him for her defense. It is for the interest of neither to perpetuate this. We are ready on our side to remedy it by extending the provisions of the treaty with North Germany over the Empire, as I have already said; but if our proposition will not be listened to, we must await the return of a better reason."

Mr. Fish, Sec. of State, to Mr. Bancroft, min. to Germany, June 4, 1873,  
For. Rel. 1873, I. 292, 293.

Two years' residence in such cases is merely *prima facie* proof of abandonment of nationality.

Mr. Fish to Mr. Davis, July 30, 1875, MS. Inst. Germany, XVI. 88; same  
to same, June 26, 1876, id. 217.

A lady, born in Prussia, came to the United States in 1852, and in 1856 was married there to a native of Bavaria, who had been naturalized in the United States. The pair resided in the United States till 1862, when, with four children, they went to Wiesbaden, where another child was born. In 1864 the husband died; and in 1869 the widow, with her children, went to Frankfort on the Main, where she afterwards resided. In 1875 she applied to the American legation in Berlin for a passport for herself and her five children. The case having been submitted to the Department of State, the Department held that the applicant, though a native of Prussia, became a citizen of the United States by her marriage with an American citizen, but that, if she came within the provisions of Art. IV. of the treaty of Feb. 22, 1868, she was not entitled to a passport; and that a renewed residence of thirteen years in Germany, begun and continued, as was stated, because of "having no special business to attend to in the United States," appeared to be, "unless wonderfully explained," evidence of a permanent residence in the country of origin.

Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Sept. 22, 1875,  
MS. Inst. Germany, XVI. 101.

"Your No. 189 is received. It encloses an announcement that hereafter naturalized Germans who have resided in Germany more than two years shall not be forced into the army immediately upon

the expiration of that time, but shall first be offered an opportunity to return to the United States. . . .

"The Department has not doubted that the construction given to article 4 of the treaty by both Mr. Bancroft and yourself, viz, that a residence of two years did not of itself forfeit naturalization, but that the question of the intent of the persons was then presented and to be decided according to the facts, was the correct one, and you are to be congratulated that a result has been reached which, if it does not concede all you have claimed as to the proper construction of this article, at least abandons a practice of enforcing the opposite construction which has been insisted on by the German military authorities. . . .

"It may not be safe or possible, however, to concede that, in every case which may in the future arise, the German authorities may compel the person to depart or to take service in the army. It is hoped, however, that the announcement referred to, and the manner in which the military laws may in the future be enforced, may prevent the recurrence of further questions."

Mr. Fish, Sec. of State, to Mr. Davis, mln. to Germany, No. 140, Nov. 5, 1875, MS. Inst. Germany, XVI. 113.

A native of Prussia, born January 22, 1853, obtained in 1869 his discharge from Prussian allegiance and emigrated to the United States. In 1874 he was naturalized, and immediately returned to Prussia. The authorities ordered him to leave, or to resume his original status, but, on the interposition of the American legation, manifested a willingness to permit him, although he was then engaged in business, to reside for two years without molestation. It seemed probable, however, that at the end of that time he would be ordered to resume his allegiance and to perform his duties as a German, or to depart from the country. With reference to this contingency the Department of State said:

"After he shall have resided in Frankfort for such a time, or under such circumstances as may prove fairly a want of intent to return to the United States, he may be held to have forfeited his naturalization. When this occurs it may be immaterial whether he does or does not owe allegiance to Germany, but it would appear at least that he can not longer claim the right to reside in Germany with all the privileges accorded by the treaty of 1868."

Mr. Fish, Sec. of State, to Mr. Davis, mln. to Germany, No. 256, July 13, 1876, MS. Inst. Germany, XVI. 223.

"A naturalized citizen may forfeit his naturalization before the two years mentioned in the treaty have elapsed. To reach this conclusion, however, in such a case, would require clearer proof than is generally

to be derived from silence or from want of a general statement of intention to return. However this may be, it would appear that any person applying for a passport may fairly be required to comply with such proper regulations as have been adopted by the legation, and to make such preliminary statements as are demanded in all cases."

Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Nov. 1, 1876, MS. Inst. Germany, XVI. 249.

"A returned naturalized citizen would be regarded by me during the period of two years' residence in Germany, his original country, as standing on the same footing in all respects as a native citizen of this country visiting Germany, and consequently as receiving the protective intervention of this Government as if he were a native.

"When, however, the residence of a returned naturalized citizen was continued in Germany beyond the two years, the clause of the treaty which permits the German Government to treat such residence as a renunciation of his naturalization in the United States would take effect upon him. Thereafter this Government would regard protective intervention in his behalf not as a matter of course, but as requiring special considerations to make it proper to insist upon his American citizenship notwithstanding his prolonged residence in his native country had exposed him to the operation of this clause of the treaty. A mere reading of the clause of the treaty will, I think, show this distinction to be necessary."

Mr. Evarts, Sec. of State, to Mr. Luxon, Nov. 21, 1878, 125 MS. Dom. Let. 362.

"While the intent to remain in the country of birth *may* be held to exist after two years' continuous residence, it is in reality not so held without special circumstances showing either an intent to remain permanently or the absence of all intent to return to the United States."

Mr. Evarts, Sec. of State, to Mr. Williams, of House Committee on Foreign Relations, Feb. 5, 1879, 13 MS. Report Book, 310.

Under the treaty of Feb. 22, 1868, "the obligation of this Government to protect you, after your return to Germany, will continue only so long as you retain in good faith an intention to return to the United States to enjoy the rights, bear the burdens, and perform the duties of an American citizen. If, as your letter intimates, you go with the intention of not returning, your exposure to be considered a German citizen will date from your arrival in Germany."

Mr. Evarts, Sec. of State, to Mr. Dietz, March 25, 1880, 132 MS. Dom. Let. 291.

With reference to the question whether, under the Bancroft treaties and similar conventions, a naturalized citizen who, by permanent

return to the country of his origin, renounces his naturalization, is held to have resumed his original nationality, the following correspondence may be noted:

A question having arisen in 1884 with regard to the legal status of the American-born sons of Germans who, after naturalization in the United States, returned during the minority of such sons to Germany, bringing their children with them, and established there a permanent residence, the German foreign office said: "As regards the fathers of such sons, no doubt can exist that they are to be regarded as having renounced their naturalization by a longer sojourn than one or two years, pursuant to the treaties regulating nationality of 1868, concluded with the United States." With reference to this statement, Mr. Frelinghuysen, as Secretary of State, said: "We think it clear that the treaty can not of itself convert an American citizen back again to a German, any more than it can make a German a citizen of the United States. There are, it is believed, many persons now in Germany whose sojourn has extended beyond the term of two years without their being called upon to resume German allegiance." Replying to this statement, Count Hatzfeldt disclaimed, on the part of his Government, "the really untenable assumption" that the naturalization treaties, in providing for the implied renunciation of naturalization, could have "the effect of restoring at the same time the former nationality." The German Government was, he declared, rather of opinion that the persons who fell within the conditions of Article IV. of the naturalization treaties with the United States were "to be reckoned neither as American citizens nor as subjects of the Empire, but as individuals without nationality," who were, however, subject to military duty under section 11 of the imperial military law of May 2, 1874.

German foreign office to Mr. Kasson, American min., Dec. 31, 1884, For. Rel. 1885, 393; Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Feb. 7, 1885, *id.* 399, 400; Count Hatzfeldt to Mr. Coleman, May 16, 1885, *id.* 417.

With reference to Mr. Frelinghuysen's instruction and Count Hatzfeldt's reply, Mr. Kasson afterwards said: "I called the Secretary's attention to one of the assumptions of that instruction which I thought not to be applicable as an objection to the German argument. Still, in executing that instruction by my communication to the foreign office, I felt bound to omit no point in the Department's views as communicated to me." (Mr. Kasson, min. to Germany, to Mr. Bayard, Sec. of State, May 19, 1885, For. Rel. 1885, 416.)

See the case of David Lemberger, *supra*, § 393.

"There can be no stronger, no clearer manifestation of intent against the *animus revertendi* than a man's own declaration followed by the establishment of a permanent domicile in the new country of his choice, and the entry into business there, and remaining in that newly chosen country until his death, over twenty-one years later.

It is also a resumption of his original nationality and native allegiance. That is a question in regard to which either the United States or Germany may insist upon its own view of, as it may be held respectively by either Government.

"It is not materially essential to the determination of the present question, but as is stated by Attorney-General Hoar in the case cited above (Vol. 13, Opinions of Attorneys-General, page 90), is usually determined by the country, claiming affirmatively, when the man is found within that jurisdiction."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, January 15, 1885, For. Rel. 1885, 396, 398.

Henry Joseph Revermann, a native of Germany, emigrated to the United States in 1850. He was naturalized in 1856 in Illinois, and continued to reside there till 1871, when he returned to Germany, taking with him a passport for himself and his family as American citizens. Among his family was a son named Ferdinand, who was born in Illinois in 1860, four years after his father's naturalization. After their return to Germany the Revermanns settled at Münster, in Westphalia, where Ferdinand's name was placed on the military rolls. In 1880 his name was stricken from the rolls on the ground that he was born a citizen of the United States. In October, 1884, however, he was informed that by order of the Royal Government at Münster he must either become naturalized in Germany or leave the country. He remonstrated against this action, but the authorities declined to modify the order. He then appealed to the legation of the United States at Berlin, and on October 31, 1884, Mr. Kasson, then American minister, requested a suspension of action till an investigation might be made. In reply to Mr. Kasson, Dr. Busch, of the German foreign office, stated in a note of December 31, 1884, that investigation had shown that the statements made in respect to Revermann were correct, and that the circumstances were similar to those in the cases of George Weigand (Wiegand) and the brothers Oppenheimer, which were presented in the notes of July 6 and November 8, 1881. Prompted by those cases, the Government had, said Dr. Busch, made a close examination of the legal status "of the sons of those Germans who, as naturalized citizens of the United States of America, had during the minority of their sons, born in America, returned in their company to Germany to reside there permanently." As to the fathers, declared Dr. Busch, there could be no doubt that they were to be regarded as having renounced their naturalization "by a longer sojourn than one or two years, pursuant to the treaties regulating nationality of 1868, concluded with the United States;" but the German Government had no hesitation in recognizing the sons as American citizens. As such, they could

not be made to perform military service in Germany, but international principles, said Dr. Busch, permitted the refusal to them of a right to sojourn in Germany. The position of the German Government was combated by Mr. Frelinghuysen in an instruction to Mr. Kasson of February 7, 1885, the substance of which was communicated by Mr. Kasson to the German foreign office on February 25. An extended answer was made by Count Hatzfeldt on May 16, 1885, reaffirming the views expressed by Dr. Busch.

See Mr. Kasson, mln. to Germany, to Mr. Frelinghuysen, Sec. of State, Jan. 6, 1885, For. Rel. 1885, 392; Mr. Frelinghuysen to Mr. Kasson, Feb. 7, 1885, *id.* 399; Count Hatzfeldt to Mr. Coleman, May 16, 1885, *id.* 417; Mr. Kasson to Mr. Bayard, May 19, 1885, *id.* 416-418.

The correspondence here cited is printed with much fullness, *supra*, § 393. For a summary of Revermann's case, see For. Rel. 1885, 430-431.

With reference to the case of a native of Württemberg who, after being naturalized in the United States, returned to his native country, apparently with no intention permanently to remain there, Mr. Frelinghuysen observed that the treaties, in providing that an intent not to go back to the country of adoption might be held to exist after a two years' residence in the country of origin, did not of themselves "work forfeiture of citizenship," but that in such a case "some affirmative governmental act was necessary to show" that the person "had, through residence in Germany, without intent to return here, forfeited his naturalization." With reference to this statement, Mr. Kasson, to whom it was addressed, observed: "If the apparent fact of a residence resumed in his native country without intention to return to the United States was true, the period of two years was quite eliminated from consideration. For the renunciation in question was effected at the time, however early, when he renewed his residence in Germany without that intent to return to the United States. . . . the two-years clause reads 'may be held;' this paragraph [Art. IV. of the treaty of 1868 with the North German Union, which provides that, if the naturalized citizen 'renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States'] reads 'shall be held;' the one grants an option, the other imposes an obligation. A similar distinction exists in the German text of the treaty. As the facts not denied showed a renewed German residence without any intent to return to the United States by the father, before the birth of the son, it seemed obligatory to conclude that American citizenship ceased, whether or not German citizenship was regained."

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, mln. to Germany, Jan. 15, 1885, For. Rel. 1885, 396; Mr. Kasson to Mr. Frelinghuysen, Feb. 14, 1885, *id.* 401.



In a report of March 20, 1885, Dr. Francis Wharton, law officer of the Department of State, maintained that, under Article IV. of the naturalization treaty of 1868 with the North German Union, a residence of more than two years of a naturalized person in the country of his origin creates only a rebuttable presumption of an intention to abandon or renounce the acquired citizenship. This report was inclosed by Mr. Bayard, Secretary of State, to Mr. Pendleton, minister to Germany, December 18, 1885, For. Rel. 1885, 438.

"In this case, as in Wedemeyer's and several others of recent occurrence, the Department is indisposed to intervene. Generally speaking, when a German, naturalized in the United States and returning to Germany, voluntarily applies to be reinstated in his German subjection, and only appeals to the legation for protection as an American citizen when the native authorities decline to readmit him as a German, the evidence of his devotion to the United States is not strong. It would in such cases be as reasonable for us to intervene to demand that Germany take back the applicant as to demand that he may indefinitely reside in Germany under the thin guise of a citizenship he sets no store by and has attempted to renounce."

Mr. Porter, Acting Sec. of State, to Mr. Pendleton, Feb. 2, 1886, MS. Inst. Germany, XVII. 594.

W., who was born in Prussia, claimed citizenship of the United States through the American citizenship of his father. It appeared that W's father was naturalized in New York in 1885, but that in 1856 he returned to Germany, his native land, where W. was born in 1862. W's father died in Germany in 1883. In 1880 W., being 18 years of age and subject to military duty, came to the United States, whereupon he was proclaimed a deserter. April 30, 1895, the ambassador of the United States was instructed to seek permission for W. to visit Germany. The German Government refused on the ground that W. was a Prussian subject, maintaining that his father had prior to his birth, by his return to and continued residence in Germany, lost his American nationality. The Department of State held that this contention was warranted, saying: "The Department has done all that it properly could in your behalf. In reply to your inquiry as to what you shall do to establish your American citizenship on a firm basis, the Department is of opinion that your best course would be to apply to a competent court for naturalization in due form."

Mr. Olney, Sec. of State, to Mr. Wilzing, September 28, 1895, 205 MS. Dom. Let. 119.

Where it was suggested that a person who intended to return to Prussia, with his family, "to stay for several years and perhaps permanently," might conserve the American citizenship of himself and his minor sons, in spite of Art. IV. of the treaty of 1868, "by returning to the United States every two years to get a new passport and to go back to Germany," the Department of State declared that the plan was "impracticable, for the reason that this Department would not issue to you a passport under such circumstances;" that such a course, if successfully accomplished, would enable a person to evade the duties and obligations of citizenship in both countries; and that the state was "entitled to expect and demand something in exchange for its protection."

Mr. Olney, Sec. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406.

"Under the statute to confer American citizenship upon the [foreign-born] child the father must be a citizen of the United States at the time of the birth of the child. If the father has become a citizen of a foreign power or if he has abandoned his citizenship in the United States before the birth of the child, the latter can make no claim to citizenship. 'If born after the father has in any way expatriated himself the children born abroad are to all intents and purposes aliens, and not entitled to protection from the United States.' (Mr. Fish to the President, August 25, 1873; Foreign Relations, 1873, Part II., p. 1191.)

"Without regard to the treaty, it is the duty of this Government to decide whether young Rosenheim is entitled to a passport. In doing this, it must necessarily pass upon the citizenship of the father, as the son can claim citizenship only through the father.

"You do not claim that Rosenheim, the father, had reacquired Bavarian citizenship, but that he had, by his acts, renounced his naturalization in the United States, and that all rights and privileges acquired thereunder were surrendered. It seems to me, in view of the father's departure from the United States a few months after his naturalization, his return to Bavaria and his establishment of a permanent domicil there as a retired gentleman (it has now been nearly thirty years since his return) that the conclusion is irresistible that he had abandoned his citizenship in the United States at the time of the birth of the son. This being so, then the son has no claim to American citizenship and is not entitled to a passport."

Mr. Olney, Sec. of State, to Mr. Uhl, ambassador to Germany, Oct. 10, 1896, For. Rel. 1896, 220.

It appeared that Rosenheim, the elder, a native of Bavaria, emigrated to the United States about 1849 and resided there till 1867, when, within six months after his naturalization, he returned to Bavaria, where

he had ever since resided. The son was born in Bavaria, June 7, 1878, and had never been in the United States. He desired a passport to visit Holland.

"I have to inform you that your dispatch No. 196, of the 1st instant, stating that Mr. Ernst Friedrich Blumenthal, who became naturalized as an American citizen in the United States court for the western district of Pennsylvania on the 5th of January, 1893, recently called on Mr. Johnson, the United States consul at Stuttgart, exhibited his naturalization certificate and surrendered his passports, and then told the consul that he intended remaining permanently in Germany and renouncing his American citizenship, has been received.

"In view of the statement made by Mr. Blumenthal, and of the fact that he voluntarily gave up his passports, the Department approves of Mr. Johnson's course in receiving them, and they have accordingly been placed on file here with your dispatch.

"It may be observed, however, that Mr. Blumenthal's statement and the surrender of his passports do not necessarily reinvest him with German nationality, but merely evidence his renunciation of his naturalization in the United States, according to Article IV. of the convention of 1868 with North Germany. Whether Germany will readmit him to citizenship is another thing.

"In a general way, if it should appear that a naturalized American citizen, by any voluntary act recognized or prescribed by German law, has resumed his German allegiance or been readmitted to German nationality, the surrender of the passport of such a person may properly be demanded."

Mr. Olney, Sec. of State, to Mr. Uhl, ambassador to Germany, Dec. 21, 1896, For. Rel. 1896, 221.

The "presumption" that a naturalized citizen of the United States of German origin intends "to take up his permanent residence in Germany and to renounce his American naturalization . . . can only be entertained after two years' residence in Germany. Earlier than that, renunciation of acquired status requires some positive act of resumption."

Mr. Hay, Sec. of State, to Mr. Jackson, chargé at Berlin, No. 912, July 25, 1899, MS. Inst. Germany, XXI. 64.

If a naturalized citizen, who, on his return to Germany, is put into the army, does not protest on the ground of his American citizenship, the burden of proof is on him to show that he did not intend to renounce his naturalization. (Ibid.)

## 3. TREATY WITH ECUADOR.

## § 472.

By Art. II. of the naturalization treaty between the United States and Ecuador of May 6, 1872, "If a naturalized citizen of either country shall renew his residence in that where he was born, without an intention of returning to that where he was naturalized, he shall be held to have reassumed the obligations of his original citizenship, and to have renounced that which he had obtained by naturalization;" and by Art. III. it is provided: "A residence of more than two years in the native country of a naturalized citizen, shall be construed as an intention on his part to stay there without returning to that where he was naturalized. This presumption, however, may be rebutted by evidence to the contrary."

The effect of these articles was discussed in the case of Julio Romano Santos, a naturalized citizen of the United States, of Ecuadorian origin, who was arrested and imprisoned in Ecuador, in 1884, on a charge of implication in a revolutionary movement by General Alfaro. Ecuador claimed that he had resumed his original citizenship, while the United States maintained the contrary.

In the course of the discussion, Mr. Bayard, May 1, 1885, said:

"It is the part of the sovereignty of every nation to prescribe the terms on which the allegiance of its own citizens shall be acquired and preserved. In the treaty with Ecuador the United States waive a part of such right of decision by admitting that two years' residence in Ecuador may create a presumption that their citizen intends to remain there. By stipulating for the right of rebuttal evidence on this point of intention, the United States wholly and absolutely regain that right of deciding as to the status of their citizens in a given case. That right is not transferred in any part to Ecuador; it is to be exercised exclusively by the United States as an attribute of their sovereignty. And Ecuador can not meet that reserved right by any mere denial of the sufficiency of the rebutting evidence which may be satisfactory to the United States. The only privilege of surrebuttal which might remain open to Ecuador would be to show that the party had done some act working an overt, voluntary, and positive renunciation of his United States citizenship of which the laws of Ecuador take cognizance or which they may prescribe as a condition to the acquisition or recovery of Ecuadorian citizenship. In other words, no surrebuttal is admissible as to intent, but must rest on the full ascertainment of legal fact."

The Government of Ecuador did not admit this construction of the treaty. On the contrary, it maintained its right to participate in the decision of the question of Mr. Santos' intent with respect to his resi-

dence in Ecuador, Mr. Flores, Ecuadorian minister at Washington, in a note of Aug. 6, 1885, saying:

"My Government has thought that in the matter of a treaty to which Ecuador was a party, any doubt concerning its interpretation ought to be settled by common accord, and that if this were impossible, the honorable example set by the United States themselves ought to be followed, namely, of submitting the disputed points to arbitration."

This position the United States eventually accepted. By a convention concluded at Quito, February 28, 1893, it was agreed to submit the case to arbitration, and it was expressly stipulated that the decision of the arbitrator should cover the following points:

"(a) Whether, according to the evidence adduced, Julio R. Santos, by his return to and residence in Ecuador, did or did not, under the provisions of the treaty of naturalization between the two governments, concluded May 6, 1872, forfeit his United States citizenship as to Ecuador, and resume the obligations of the latter country.

"(b) If he did not so forfeit his United States citizenship, whether or not it was shown by the evidence adduced, that Julio R. Santos has been guilty of such acts of unfriendliness and hostility to the Government of Ecuador, as, under the law of nations, deprived him of the consideration and protection due a neutral citizen of a friendly nation."

These questions were not in the end decided. Cases were prepared, and the arbitrator was appointed; but, General Alfaro having at length become President of Ecuador, he agreed to pay the claimant a certain sum, which was, with the concurrence of the United States, embodied by the arbitrator in a purely formal award, the litigious part of the proceedings being thus dispensed with.

For a fuller account of this case, and a summary of the evidence concerning Mr. Santos' citizenship, see Moore, *Int. Arbitrations*, II. 1584 et seq.

For the correspondence between Mr. Bayard and Mr. Flores, above cited, see Mr. Bayard, Sec. of State, to Mr. Beach, consul at Guayaquil, May 1, 1885; Mr. Flores, Ecuadorian min., to Mr. Bayard, Sec. of State, Aug. 6, 1885: H. Ex. Doc. 361, 49 Cong. 1 sess. 30, 67.

In 1890, the Ecuadorian Government proposed to amend Art. III. of the treaty of 1872, by providing that a four years' residence in Ecuador, or the making of investments there "in long operations of farming or other business requiring a long time for development," by an Ecuadorian who had been naturalized in the United States, should be conclusive evidence of resumption of Ecuadorian nationality. The United States, while expressing its sympathy with the object of the proposal, which was understood to be the prevention of the abuse of the privilege of naturalization, declined to accept it, on the ground

that "in treating a subject which, like that of citizenship, may involve questions of intention that must often be determined upon the most ample consideration of facts, it is a hazardous undertaking to attempt to formulate inflexible rules for the determination of all cases, whatever may be their circumstances."

Mr. Blaine, Sec. of State, to Mr. Caamano, May 19, 1890, MS. Notes to Ecuador, I. 140.

#### 4. TREATY WITH DENMARK.

##### § 473.

The Danish Government ordered the name of F. A. Sundberg, a naturalized citizen of the United States of Danish origin, who had been living in Copenhagen for four years as a cutter in a tailoring establishment, but who alleged that his stay in Denmark had been protracted beyond his original intentions by considerations of family and of health, to be stricken from the military rolls, "in accordance with article 3 of the convention concluded . . . July 20, 1872," there being an "absence of sufficient reason for supposing" that he had "abandoned his intention to return to America."

Mr. Krag, min. of for. aff., to Mr. Swenson, U. S. min., May 21, 1900, For. Rel. 1900, 424.

See Mr. Frelinghuysen, Sec. of State, to Mr. Fish, min. to Belg., No. 35, April 23, 1883, MS. Inst. Belg. III. 323.

#### XV. LOSS OF RIGHT TO NATIONAL PROTECTION.

##### 1. FOREIGN DOMICIL.

##### (1) NATIVE CITIZENS.

##### § 474.

"The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition. But his situation is completely changed, where by his own act he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom

he has sworn allegiance, and, consequently, takes him out of the description of the act."

Marshall, C. J., in *Murray v. Schooner Charming Betsy*, 2 Cranch, 120. See the *Santissima Trinidad*, 1 Brock. 478.

A claim to American citizenship will not be decided by the Department of State on the *ex parte* application of the government against which the person, whose citizenship is in question, invokes the protection of the United States.

Mr. Bayard, Sec. of State, to Mr. de Bounder de Melsbroeck, Belgian min., April 11, 1887, For. Rel. 1887, 42.

This note related to the case of Emile Dewaele, who was born in Belgium in 1867 and who, in order to avoid conscription, invoked the naturalization of his father, Charles Dewaele, in 1880 in the United States. The Belgian Government desired to ascertain whether the father, whose certificate of naturalization was thought not to be properly certified, was "really a citizen of the United States," and whether the effects of naturalization were extended to children (1) when they lived with their father in the United States, and (2) when they resided abroad. (For. Rel. 1887, 41.)

"I have duly received your note of the 5th instant with the accompanying papers relative to the case of Elijah C. Woodman, who it appears emigrated to Canada, in 1832, was concerned in the revolutionary movement in 1838, and was subsequently for that offence transported to Van Diemens Land, where he is still a prisoner.

"This Department has from time to time forwarded, through our minister at London, particular applications, addressed to Her Britannic Majesty, in behalf of American citizens, undergoing sentence of transportation in the British penal colonies, but as Woodman had resided for several years within British jurisdiction, creating a presumption that he was no longer a citizen of the United States, his case is not deemed one in which this Department could properly interfere. If an assurance can be given me that he did not renounce his citizenship after taking up his residence in Canada, and his friends will address a petition to Her Britannic Majesty praying for his pardon, I will cause it to be presented to the British Government by our minister in England. The papers enclosed with your note are herewith returned."

Mr. Calhoun, Sec. of State, to Mr. Fairfield, U. S. S. Dec. 9, 1844, 35 MS. Dom. Let. 40.

"You inform us that many American citizens have gone to settle in the [Sandwich] islands; if so they have ceased to be American citizens. The Government of the United States must, of course, feel an interest in them not extended to foreigners, but by the law of nations they have no right further to demand the protection of this

Government. Whatever aid or protection might under any circumstances be given them must be given, not as a matter of right on their part, but in consistency with the general policy and duty of the Government and its relations with friendly powers.

"You will therefore not encourage in them, nor indeed in any others, any idea or expectation that the islands will become annexed to the United States. All this, I repeat, will be judged of hereafter, as circumstances and events may require, by the Government at Washington."

Mr. Webster, Sec. of State, to Mr. Severance, July 14, 1851, H. Ex. Doc. 48, 53 Cong. 2 sess. 342, 343.

The presumption of abandonment of nationality by long residence abroad is rebutted by proof that such residence was that of a missionary who neither intended to relinquish his nationality nor abandoned the intention of coming home.

Mr. Everett, Sec. of State, to Mr. Marsh, Feb. 5, 1853, S. Ex. Doc. 9, 33 Cong. 2 sess. 5, 9. See, also, Mr. Webster, Sec. of State, to Mr. Marsh, April 29, 1852, *id.* 2, 3-4.

Persons voluntarily emigrating from the United States to take up a permanent abode in a foreign land, "cease to be citizens of the United States, and can have after such a change of allegiance no claims to protection as such citizens from this Government."

Mr. Marcy, Sec. of State, to Mr. Kinney, Feb. 4, 1855, 43 MS. Dom. Let. 362; cited in Mr. Bayard, Sec. of State, to Mr. Hanna, No. 22, June 25, 1886, MS. Inst. Arg. Rep. XVI. 385.

See, however, the decisions of international commissions, Moore, *Int. Arbitrations*, III. 2657-2678; and particularly the able and learned argument of Mr. Ashton, *id.* 2696-2706.

"Though there is no law forbidding a citizen of this country who goes abroad with an intention to settle, to resume his rights as a citizen on his return, how long soever he may have been absent, while he is under the jurisdiction of the foreign Government, for the purpose of carrying on business, and especially as in this case, for engaging in mining operations, he must be presumed to have been satisfied with the ability and disposition of such Government to protect his property and his person.

"It is essential to the independence of nations, and to the public peace, that there should be some limit to the right and duty of a Government to interfere in behalf of persons born or naturalized within its jurisdiction, who, on proceeding to a foreign country, and being domiciliated there, may receive injuries from the authorities thereof. By the general law, as well as by the decisions of the most enlightened judges both in England and in this country, a neutral engaged in



business in an enemy's country during war, is regarded as a citizen or subject of that country, and his property, captured on the high seas, is liable to condemnation as lawful prize. No sufficient reason is perceived why the same rule should not hold good in time of peace, also, as to the protection due to the property and persons of citizens or subjects of a country domiciled abroad."

Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, May 24, 1855, MS. Inst. Peru, XV. 159.

"Citizens of the United States, who, retaining their domiciles in the United States, are temporarily traveling or sojourning in New Granada, are to be regarded as entitled to the protection of their own Government against any impositions of the Government there for its support and maintenance. But citizens of the United States, no matter how they acquired that title, who have gone to New Granada, become domiciliated there, and are pursuing business or otherwise living there, without definite and manifest intentions of returning to this country, are subject to all the laws of New Granada affecting property or material rights exactly the same as the citizens of New Granada. . . .

"The principle upon which this decision rests is that protection and allegiance are reciprocal; that the citizen of the United States who becomes domiciliated in another country, contributing his labor, talents, or wealth, to the support of society there, becomes practically a member of the political state existing there, and for the time withdraws himself from the duties of citizenship here, and consents to waive the reciprocal right of protection from his own Government."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, Jan. 16, 1862, MS. Inst. Colombia, XVI. 20.

It should be observed that this instruction was given in response to an inquiry whether citizens of the United States, domiciled in Colombia, could "claim exemptions from the laws and degrees of that country for levying taxes and contributions obligatory upon its own citizens." In the course of the instruction, Mr. Seward said: "For obvious reasons, I limit this statement [made in the first paragraph, supra,] to the exact case you have presented, without inquiring how the citizen of the United States thus circumstanced may recover and resume his plenary rights, and without inquiring how far such citizens so domiciliated in New Granada retain the right to the protection of this Government in regard to their personal liberty, if it should be invaded."

See the decision of Commander Bertinatti, umpire, Dec. 31, 1862, Moore, Int. Arbitrations, III. 2695.

"This Government owes to no citizen who has voluntarily withdrawn his person and property from the country, any obligation to lend him its political powers to influence in his favor the adjudication of the courts of justice of the country in which he proposes to reside,

in the trial of questions arising upon contracts made under the laws of that country."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 48, Jan. 30, 1863, MS. Inst. Colombia, XVI. 60.

Two persons, named Albee and Gordon, claimed the interposition of the American representatives in the Argentine Republic, in order to escape arrest for refusing to perform military service in 1866. It appeared that they left the United States "some years ago," with "no fixed intention of returning," and had "ever since made the Argentine Republic the place of their business and residence." In 1866, during a rebellious rising, the public authorities in certain parts of the Republic ordered the enrolment of the national guard, and, martial law having been proclaimed, arrested various persons suspected of hostile intentions, as well as others who refused to respond and enrol their names in the guard. Mr. Seward stated that citizens of the United States "who have become and are remaining domiciled in foreign countries could not be exempt from certain common obligations of citizens of those countries to pay taxes and perform duties imposed for the preservation of public order and the maintenance of the government;" but that the treaty between the United States and the Argentine Republic exempted citizens of the one country from the performance of all compulsory military service and from the payment of all forced loans, requisitions, and military exactions in the other. If Messrs. Albee and Gordon should complain that their rights were directly invaded or menaced by the exaction of military service or of war contributions, the minister of the United States was instructed that it would be his duty "to ascertain not only the justice of the complaint, but also the fact of the citizenship of the complainant," and then to address himself to the Government "requiring the performance of the treaty stipulation."

Mr. Seward, Sec. of State, to Mr. Asboth, No. 27, March 27, 1867, MS. Inst. Argentine Repub. XV. 275.

Citizens of the United States who were concerned in the insurrection of 1861 against the United States, and who, after its close, decline to return to their allegiance, and go into the service of a foreign country, are not entitled to the interposition of the Government of the United States for redress for injuries inflicted on them in such foreign country.

Mr. Seward, Sec. of State, to Mr. Sullivan, Feb. 4, 1869, MS. Inst. Colombia, XVI. 345.

"You declare that you have been thirty-five years absent from this country and residing in Hayti. You do not indicate that you ever had or now have an intention of returning to the United States.

Although it may be that you have not by any formal act of naturalization renounced your allegiance to the United States, a residence of so long continuance in Hayti raises a strong presumption that you have incorporated yourself into the permanent population of the island and ceased to regard yourself as subject to the duties of a citizen. It will be regarded as quite material in respect to your national character to know whether you have complied with the provisions of the acts of Congress passed in 1862 and subsequent years imposing an income tax upon citizens residing abroad. This Department will therefore be glad to be informed in what Congressional District or Districts you have made the returns required by those acts. In the absence of any further information, I shall not feel at liberty to address any instructions to Mr. Bassett in relation to your case."

Mr. Fish, Sec. of State, to Mr. Hepburn, Dec. 21, 1870, 87 MS. Dom. Let. 312.

See, to the same effect, in the case of a native of the United States, born in 1800, who emigrated to Hayti in 1824 and had lived there 56 years, and still lived there, Mr. Fish, Sec. of State, to Mr. Allen, Jan. 18, 1871, 88 MS. Dom. Let. 19.

The same thing was said by Mr. Fish in the case of Juan A. Robinson, who had resided in Mexico 38 years, during which he suffered the losses complained of, but who seemed to have returned to the United States at the time of presenting the claim in question. (Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871, 91 MS. Dom. Let. 211.)

Mr. Robinson appeared as a citizen of the United States before International Commissions. (Moore, Int. Arbitrations, III. 3038; IV. 3410.)

To the same effect as the letter to Mr. Hepburn, see Mr. Fish, Sec. of State, to Mr. Wilson, Dec. 5, 1870, 87 MS. Dom. Let. 189; to Mr. Brauno, Dec. 7, 1870, id. 198; to Mr. Overmann, Jan. 13, 1871, id. 566.

"Citizenship involves duties and obligations, as well as rights. The correlative right of protection by the Government may be waived or lost by long-continued avoidance and silent withdrawal from the performance of the duties of citizenship as well as by open renunciation."

Mr. Fish, Sec. of State, to Mr. Niles, Oct. 30, 1871, 91 MS. Dom. Let. 211.

To same effect, see Mr. Fish, Sec. of State, to Mr. Colfax, March 12, 1872, 93 MS. Dom. Let. 113; to Mr. Howard, April 23, 1872, 93 MS. Dom. Let. 544; Mr. Fish, Sec. of State, to Mr. Beardsley, April 28, 1873, MS. Inst. Barbary Powers, XVI. 136.

In 1873 the legation of the United States at Paris requested instructions as to the case of a man and his wife, Americans by birth, who had settled in Paris forty years before and had lived there ever since. "This has," said the legation, "become their permanent home, and they have never had any intention of returning to the United States.

Several of their children have been born here, and have never been to the United States, and never expect to go, and never want to go."

The Department of State replied: "If the citizen, on the one side, has rights which he may claim at the hands of the Government, on the other side there are imperative duties which he should perform toward that Government. If, on the one hand, the Government assumes the duty of protecting his rights and his privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction, if he places his property where it can not be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognized in the fourteenth amendment, and in the act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 259. The statement of Chief Justice Marshall referred to in the foregoing passage is that which is quoted at the beginning of the present section.

"The right to be acknowledged as a citizen of the United States must be held as a high privilege and a precious right. When the person who possesses it is untainted by crime, or by the suspicion of expatriation, or by the non-fulfillment of the duties which accompany it, it entitles him abroad to the recognition and protection of a power which is not the least among the powers of the earth, while at home, under general regulations of law, he may participate in the distribution of political rights and privileges, he may enjoy the national guarantees of liberty and of protection to personal property, and he may share the advantages of education and the healthful social and moral influences which result from democratic institutions."

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 258.

"This Department would not assume to decide that . . . a continuous residence in a foreign country of two or even of many years should of itself work an expatriation. Expatriation is a fact to be established, like any other fact, by external evidence, and such continuous residence, even for a lifetime, is capable of being explained on other theories than that of a voluntary denationalization. But when the fact is once established, by whatever proof, it would, in the

opinion of this Department, operate to place the expatriated person outside the number of those who can claim the protection of this Government as a right.

“The duty of protection as toward the citizen, or the right of its exercise as toward the foreign power, is not always correlative with the fact of citizenship. Thus it was demonstrated by my predecessor, Mr. Marcy, that an extreme case may arise in which a government will be justified in taking upon itself the protection of persons who are not citizens. On the other hand, it is apparent that there may be instances of claims to citizenship which is nominal only, if it have any existence, as where the duties of citizenship have never been performed, where the person of the individual has never been within the national jurisdiction, or is voluntarily removed from it, and purposely kept beyond it; where his movable wealth is purposely placed where it may never contribute to the national necessities, and his income is expended for the benefit of a foreign government, and his accumulations go to swell its taxable wealth; and where from all the surrounding circumstances it must be assumed that he has abandoned the United States, and never intends to return to it.

“It can not be contended that a person with so faint an exercise of the duties of citizenship is entitled to claim the protection of this Government as a right.

“Each case as it arises must be decided on its own merits. In each the main fact to be determined will be this, has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?

“If there has not been the applicant will be entitled to protection.”

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873,  
For. Rel. 1873, I. 256, 259.

“I invite the earnest attention of Congress to the existing laws of the United States respecting expatriation and the election of nationality by individuals. Many citizens of the United States reside permanently abroad with their families. Under the provisions of the act approved February 10, 1855, the children of such persons are to be deemed and taken to be citizens of the United States, but the rights of citizenship are not to descend to persons whose fathers never resided in the United States.

“It thus happens that persons who have never resided within the United States have been enabled to put forward a pretension to the protection of the United States against the claim to military service of the government under whose protection they were born and have been reared. In some cases even naturalized citizens of the United States have returned to the land of their birth, with intent to remain there, and their children, the issue of a marriage contracted there

after their return, and who have never been in the United States, have laid claim to our protection, when the lapse of many years had imposed upon them the duty of military service to the only government which had ever known them personally."

President Grant, annual message, Dec. 1, 1873, For. Rel. 1873, I. vi.

"It is confessedly a rule of public law, consonant with the policy of this Government, that, if a citizen leaves his country without a purpose to return, he forfeits the right to claim the protection of the Government to which he previously owed allegiance. This Department has on several occasions held that the intent totally to abandon his native country might so far be justly inferred from the purchase or cultivation of land abroad as to make it at most discretionary with this Government to interfere for the redress of grievances which the emigrant might incur in the country of his adoption."

Mr. Fish, Sec. of State, to Mr. Williamson, min. to Costa Rica, No. 158, March 16, 1875, MS. Inst. Costa Rica, XVII. 236.

"I have to acknowledge the receipt of your communication of August 15, in relation to the complaint of Mrs. James Morris against the Government of Hayti, for alleged wrongful imprisonment of her husband and deprivation of property during the revolutionary disturbances of 1883-84. . . . It appears from your letters of June 7 and 10 last, that James Morris left the United States a great many years prior to his decease; that he became domiciled in Hayti, engaged in business there, married and identified himself with that country, where he remained until his death, by no act manifesting any intention ever to return to the United States. After his decease his wife, who was by birth a subject of Great Britain, returned to the home of her father in British territory, where she now resides. In view of the above, the Department is of opinion that it would not be warranted in intervening in her behalf."

Mr. Gresham, Sec. of State, to Mr. Smith, Sept. 1, 1893, 193 MS. Dom. Let. 303.

B. was born in New York in 1855. In 1862 he left the United States, and he subsequently took up his permanent residence in Edinburgh, Scotland, where he resided without any intention of returning to the United States to reside and perform the duties of citizenship. The embassy of the United States in London having refused in 1895 to issue him a passport, he appealed to the Department of State, which said: "Your absence from the United States for a period of 33 years, coupled with your statement that you permanently reside abroad and do not intend to come to the United States and make your residence here, clearly indicates that you have abandoned your

right to American protection. The embassy very properly declined to give you a passport."

Mr. Olney, Secretary of State, to Mr. Bendit, June 21, 1895, 203 MS. Dom. Let. 2.

(2) NATURALIZED CITIZENS.

§ 475.

In the case of Luis Yager, who asserted a claim as a citizen of the United States for the appropriation of his property by the military agents of Paraguay, Mr. Seward said:

"The Department desires to be assured of Mr. Yager's right to invoke the protection of this Government. So many persons are found to have obtained naturalization without any real design of permanent residence in the United States, but for the purpose of availing themselves of the advantages of citizenship while evading its responsibilities and duties by continual residence in a foreign country, that it has become necessary to enquire, especially in the South American states, how far the person claiming to be one of our citizens is to be regarded as having assumed and maintained that character in good faith. The period during which he resided in this country, and abroad, respectively, and the manner in which he deported himself during the recent rebellion are proper elements in the determination."

Mr. Seward, Sec. of State, to Mr. Washburn, min. to Paraguay, Nov. 27, 1867, MS. Inst. Paraguay, I. 111.

See, to the same effect, correspondence of Mr. Seward with Mr. Riotte, min. to Costa Rica, Dip. Cor. 1866, II. 430-435.

"It is also possible for a naturalized citizen, by returning to his native country and residing there with an evident intent to remain, or by accepting offices there inconsistent with his adopted citizenship, or by concealing for a length of time the fact of his naturalization and passing himself as a citizen of his native country, until occasion may make it his interest to ask the intervention of the country of his adoption, or in other ways which may show an intent to abandon his acquired rights, to so far resume his original allegiance as to absolve the government of his adopted country from the obligation to protect him as a citizen while he remains in his native land."

Mr. Fish, Sec. of State, to Mr. Hall, vice consul-general at Havana, May 3, 1869, S. Ex. Doc. 108, 41 Cong. 2 sess. 201, 202.

See the case of *J. B. Lacoste v. Mexico*, U. S. & Mex. Commission, Moore, Int. Arbitrations, III. 2561.

"Cautious scrutiny is enjoined in such cases, because evidence has been accumulating in this Department for some years that many

aliens seek naturalization in the United States without any design of subjecting themselves by permanent residence to the duties and burdens of citizenship, and solely for the purpose of returning to their native country and fixing their domicil and pursuing business therein, relying on such naturalization to evade the obligations of citizenship to the country of their native allegiance and actual habitation. To allow such pretensions would be to tolerate a fraud upon both the Governments, enabling a man to enjoy the advantages of two nationalities and to escape the duties and burdens of each."

Mr. Fish, Sec. of State, to Mr. Motley, min. to England, circular, Oct. 14, 1869, MS. Inst. Gr. Brit. XXII. 130.

"In judging Mr. Orlich's claim to protection as an American citizen, you have the principle laid down in the circular from this Department issued October 14, 1869, to guide you. Without determining that the continued residence in Turkey of an Hungarian or Austrian who may have been naturalized as an American citizen is necessarily to be regarded in the same light as the circular indicates with respect to a naturalized citizen returning to the country of his nativity, it may well be that the same principle applies. The fact of the person having been born in a contiguous jurisdiction assimilates his case very closely to the case contemplated by the circular, which was intended only to indicate the general principle and theory by which the agents of the Government in foreign countries are to be governed in deciding the questions which come before them.

"Among the tests which may be applied to determine the intent of a naturalized person who resides continuously abroad, the fact of payment by such person of the income and excise taxes which have been imposed by law (since 1861) upon American citizens will be an important aid. Inquiry should be made when, and in what assessment district, the returns required by the internal-revenue laws have been made; where and to whom the taxes have been paid. The omission to have made the returns, or to have paid any tax, would necessarily cast grave suspicion upon the claim of the party applying for the protection of a government from whose support he has withheld the contributions required of all its citizens, whether resident at home or abroad; and if such omission has been long continued, it will, as a general rule, justify the refusal of a recognition of the claim to protection."

Mr. Fish, Sec. of State, to Mr. MacVeagh, Dec. 13, 1870, For. Rel. 1871, 887, 888.

Cited in Mr. Fish, Sec. of State, to Mr. Wing, min. to Ecuador, Dec. 15, 1870, MS. Inst. Ecuador, I. 248.

"An eminent predecessor of mine in this Department, in an instruction to a minister of the United States in a foreign country, expressed



the opinion that 'It can admit of no doubt that the naturalization laws of the United States contemplate the residence in the country of naturalized citizens, unless they shall go abroad in the public service or for temporary purposes.' "

Mr. Fish, Sec. of State, to Mr. Wing, Dec. 15, 1870, MS. Inst. Ecuador, I. 248.

"Naturalization effected in the United States without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities that would otherwise attach to the naturalized person, ought to be treated by the Government of the United States as fraudulent, and as imposing upon it no obligation to protect such person; and as to this, the Executive must judge from all the circumstances of the case."

Williams, At-Gen., Aug. 20, 1873, 14 Op. 295, 299.

In 1883 John McCormack invoked the intervention of the United States to secure for him the payment by Great Britain of a claim of \$50,000, as indemnity for five months' imprisonment in Ireland. It appeared that he was naturalized in the United States in 1867, but returned in 1869 to Ireland, and remained there, with the exception of a brief visit to America in 1873, till the time of his arrest in the latter part of 1881 or the beginning of 1882. He had thus been absent fourteen years from his adopted country, and been meanwhile a resident of the country of his original allegiance. He had paid no taxes, either State or Federal, in the United States, and did not allege that he had any property there, nor had he given any manifestation of an intention to return to the United States. The Government of the United States declined to present his claim.

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, Feb. 27, 1884, For. Rel. 1884, 216.

"The question whether this Government should or should not intervene in behalf of a citizen abroad cannot be determined solely by the fact of citizenship. Such intervention is an international right which, for the protection and preservation of the good name and influence of governments, is not to be asserted and maintained in favor of persons who have sought to obtain it by fraudulent means."

Mr. Bayard, Sec. of State, to Mr. Winchester, No. 33, Dec. 28, 1885, MS. Inst. Switz. II. 295. See also Mr. Bayard, Sec. of State, to Mr. Sterne, April 20, 1886, 159 MS. Dom. Let. 674.

"Mr. Bagur resided in the United States from 1852 to 1865; and in 1860 appears to have been naturalized here, but, in view of what follows, no opinion is necessary as to the regularity of this procedure.

In 1865 he returned to Spain. Thither he carried his wife, recently married, there his children were born, and there he has since remained—over twenty years. The fact that he has never voted or held office in Spain, or taken part in any political demonstration there, may show that he is not a zealous Spaniard, but does not prove him to have been a loyal citizen of the United States.

“While there is no allegation that he intended to return to the United States, the inference to the contrary is rendered very strong by his settlement in Spain after his marriage, the selection of Spain as the place of his children’s birth and education, and by his failure even now to make any effort to return. Moreover there is no evidence that he ever contributed by payment of taxes or otherwise to the support of this Government. The facts furnish a presumption, not rebutted, that he has abandoned his nationality, involving his minor children in the same abandonment. Under these circumstances thus understood the legation will not accede to the request of Mr. Bagur for a United States passport.”

Mr. Porter, Acting Sec. of State, to Mr. Curry, Jan. 4, 1886, MS. Inst., Spain, XX. 138.

“You state that you are a naturalized American citizen of German birth and that your parents, being aged, can not attend to business any longer and wish you to come back to Germany to take charge of the same. You enquire whether under these circumstances you would be entitled to protection in Germany as an American citizen.

“In reply you are informed that this Department holds that if a naturalized citizen of the United States of his own free will leaves his adopted country and returns to his native land, settles himself in business there in his own right and not merely as the agent of an American house, withdraws himself from the duties of citizenship in his adopted country and voluntarily resides abroad, as a matter of choice for such a period as reasonably leads to the inference of the *animus manendi* which constitutes domicile, then, by his own action he renounces his right to call on the United States to protect him against the government whose control he has so chosen to place himself under.”

Mr. Porter, Act. Sec. of State, to Mr. Meyer, June 30, 1887, 164 MS. Dom. Let. 519.

“Rooney, Ross, and Peterson appear, from their own statements, to have made their permanent domicile—their home—in Hawaii, and to have cast their lot with the people of those islands.

“It is incumbent upon all of these persons to rebut in a satisfactory manner the presumption of abandonment of their American charac-

ter by showing that they contemplated a return to this country to participate in the obligations as well as to share the rights of its citizens. The same remark is applicable—though the presumption of abandonment of American character is much weaker in his case than in those of the others named—to Arthur White, who seems to have been in Hawaii about eight years, but who does not appear definitely to have made his permanent home there.”

Mr. Uhl, Act. Sec. of State, to Mr. Willis, min. to Hawaii, May 14, 1895.  
For. Rel. 1895, II. 854, 856.

The persons above mentioned sought the support of the United States for claims against the Hawaiian Government for alleged arbitrary arrest and injurious treatment in connection with the attempted insurrection of January, 1895.

Peterson's claim to protection was rejected on its being ascertained that he had never been fully naturalized in the United States. (For. Rel. 1895, II. 856.)

“Molteno was born in Hawaii, and, though naturalized here, returned there some years ago, and has continuously resided there since. This fact unexplained raises at least a presumption of his abandonment of any right to our protection, such a presumption being more easily entertained in the case of a foreigner naturalized here and returning to his native land than in the case of a native American taking up his residence in a foreign country.”

Mr. Uhl, Act. Sec. of State, to Mr. Willis, min. to Hawaii, May 14, 1895.  
For. Rel. 1895, II. 854, 856.

“The duty of allegiance goes hand in hand with the right of protection. Those who become naturalized as American citizens and then take up their permanent abode in a foreign land lose the right to claim the protection of this Government when they cease to pay it allegiance. In coming to a determination in any particular case whether protection should be granted or refused, great care should be taken not to withhold protection where it may be justly claimed; but you are authorized to refuse it if upon a careful investigation you are satisfied that the privilege of naturalization has been abused for the mere sake of protection, and without any bona fide intention to bear allegiance to the United States.”

Mr. Hay, Sec. of State, to Mr. Hardy, min. to Persia, Feb. 2, 1899, For. Rel. 1898, 528, 529.

“A naturalized citizen may, by returning to his native country and residing there with an evident intention to remain, . . . or by concealing for a length of time the fact of his naturalization, and passing himself as a citizen or subject of his native country until occasion may make it his interest to ask the intervention of the coun-

try of his adoption, . . . so far resume his original allegiance as to absolve the government of his adopted country from the obligation to protect him as a citizen while he remains in his native land."

Consular Regulations of the U. S., 1874, § 110.

See, to the same effect, Mr. Fish, Sec. of State, to Mr. Hall, vice consul-general at Havana, May 3, 1869, S. Ex. Doc. 108, 41 Cong., 2 sess., 202.

"Persons who conceal their American nationality and represent themselves to be Ottoman subjects are not entitled to call upon this Government for protection."

Mr. Hill, Act. Sec. of State, to Mr. Griscom, chargé, No. 345, Feb. 16, 1901, MS. Inst. Turkey, VII. 513.

### (3) AMERICAN BUSINESS INTERESTS.

#### § 476.

"It is highly conducive to the beneficial developments of these relations that in selecting selling and other agents in a foreign land, our producing and manufacturing houses should be able to avail themselves of the services of such natives of the countries to be dealt with as have become citizens of the United States. In this way we obtain for ourselves the agent's knowledge of the language and other conditions of the country to which he is sent, while, from the fact of his naturalization in the United States, we have a political hold on him, and are able, to some extent, to guarantee his personal rights. Hence it is a common practice of our great producing and exporting houses to send to Europe, as well as to South America, agents who are natives of the country of their agency, but who have intermediately become loyal citizens of the United States. There can be no doubt that this practice has proved very beneficial to the country of the agency, as well as to the country from which the agent is sent forth. To limit such an agency to two years would greatly destroy its efficiency. By the rules of international law, as recognized by all civilized nations, an agent of this class may live and do business in the place of his agency (if his intention is to return to dwell permanently in the place from which he is sent) without acquiring a domicile, or being subjected to a citizenship in the place of his agency. Nor, so far as concerns citizenship, is this rule modified by the treaty between the United States and Ecuador."

Opinion appended to instructions of Mr. Bayard, Sec. of State, to Mr. Beach, consul-general at Guayaquil, May 1, 1885, For. Rel. 1886, 251, 253.

W., a citizen of the United States, had for a series of years resided in South America, as the representative of business interests in the

United States. During those years his visits to the United States were occasional and brief; but there was evidence that he always maintained his position as a citizen of the United States and that he paid an income tax to the United States. There was no proof of any renunciation of his allegiance to the United States or of his becoming naturalized in any of the foreign countries in which he had resided. As a matter of policy, therefore, as well as of international law, it was held that his domicil and nationality were in the United States.

Mr. Bayard, Sec. of State, to Mr. Roberts, min to Chile, March 20, 1886,  
MS. Inst. Chile, XVII. 196.

S. was born in Bavaria in 1844; emigrated to the United States in 1865; and was naturalized in 1880. Immediately afterwards he went to Switzerland and settled down as manager of a manufacturing establishment, which was a branch of a house in New York. In 1887 he applied to the American legation in Berne for a passport, using for the purpose the prescribed form, which contained a declaration that he was residing abroad temporarily, but that he intended to return to the United States in two years to reside and perform the duties of citizenship there. The legation granted the passport, but, in reporting its action to the Department of State, adverted to the frequency of the cases in which persons, in a situation similar to S's, after making the usual declaration appeared again at the end of the two years and made the same declaration, and so on *ad infinitum*. In reply, the Department said that the rule as to loss of diplomatic protection by an apparently permanent abode in a foreign country did "not apply to citizens of the United States going and remaining abroad as agents of American business houses. It is as to these," continued the Department, "that one of your inquiries is put, and I have to call attention, in reply, to the wide difference between such parties as these and absentees whose continued residence abroad can be explained only on the ground of their desire to get rid of the obligation imposed on all good citizens of contributing by their services whatever is in their power to their country's prosperity. The agent abroad of an American house is open to no such charge. The continued presence of such agents at their scene of duty is essential to the maintenance of some of our great industries, and these agents, in living and working abroad in this way, are as much entitled to the protection of the Department, no matter how long they remain away, as if they were on a mere transient visit of inquiry. And, as I have previously had occasion to observe, this protection is applicable as well to naturalized citizens returning to their country of origin as to native citizens of the United States, since it is in many cases peculiarly for the interests of business houses to employ in a foreign land

agents familiar with the language and traditions of such land, and since, when such agency is avowed, there is as little ground for an inference of abandonment of American citizenship in one case as in the other."

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Oct. 12, 1887, For. Rel. 1887, 1073.

Mr. Winchester's dispatch is printed in the same volume, at p. 1069.

"If your client resides abroad as a member of an American firm, or as the necessary agent or factor of an enterprise originating and having its principal seat in the United States, and if he can truthfully aver his intention to return to the United States within a reasonable time, his case would be in good shape to make application to the embassy at London for a passport. In cases of representative business agencies abroad, the Department does not exact a declaration of intent to return at a fixed time, but it does require a declaration of a fixed intent to return sometime, which intent shall not be negatived by the obvious circumstances of the applicant's domicile abroad. Otherwise, in conformity with the admitted right of self-expatriation, the party must be deemed free to voluntarily abandon his American domicile and forego the duties of good citizenship, by permanent residence abroad, even though by so doing he absolves this Government from the reciprocal duty to protect him so long as he continues to withdraw himself from his natural allegiance.

Mr. Olney, Sec. of State, to Mr. Sturtevant, Nov. 25, 1896, 214 MS. Dom. Let. 158.

#### (4) REASONS OF HEALTH.

### § 477.

"It is presumed you will not deny that when a citizen of the United States goes abroad, without any intention to return, he forfeits, with his abandonment of his country, all right to the protection of its government. It is possible that, in going to the Fiji Islands, Mr. Burt may have purposed returning to his native country at some future period, but if this Department is not aware of any formal renunciation of his nationality on leaving for that quarter, it is equally unaware of any formal declaration of an intention to resume his abode in the United States and his allegiance to its Government. His purposes, therefore, are left open to inference. Is there any case in which the Government may assume that a citizen who may have gone abroad has abandoned all intention to return home? There must be such in the nature of things. Sometimes such an inference is justified by the length of the stay of the citizen in foreign parts. If his absence should have been unduly protracted, thereby exempting him from the liabilities and burdens of

a citizen, and, especially, if, during the same period, events should have occurred appealing to the patriotism of all citizens to share equally in the common liabilities and burdens, when the occasion for such an appeal shall have passed, the party returns and asks help to avenge grievances there experienced during his country's agony at home, the duty of complying with such request is, to say the least, regarded as questionable.

"You say that Mr. Burt bought a tract of land in a remote district of the Fiji Islands. If one thing more than another can justify the inference that a citizen who has left his own and continues a residence in a foreign country does this without an intention to return, it is when the person so leaving purchases, lives on, and works land in the foreign country. Mere travelers confessedly go abroad meaning to stay a limited time. Such, also, usually is the case with those who may go for scientific purposes; less so with those who go for objects of trade. When, however, a man buys, settles on, and cultivates an estate in a foreign country under such circumstances as those attending Mr. Burt's abode in the Fiji Islands, he may fairly be regarded as practically expatriated."

Mr. Fish, Sec. of State, to Mr. Hackett, June 12, 1873, 99 MS. Dom. Let. 205.

"It appears from your statement that you emigrated from the United States to Fiji in 1866, your object being to obtain a residence in a climate more favorable to your health. You there made considerable investments. In 1875 the Fiji Islands were annexed to Great Britain, and it appears that you suffered various injuries, both from the Fiji and the British Governments, which would entitle you to redress at least from the latter; and if you were a citizen of the United States, domiciled in the United States, you might in some contingencies sustain an appeal for the diplomatic intervention of this Department. Whether you still remain a citizen of the United States is a question which it is not necessary here to discuss. It is sufficient to say that your adoption of Fiji as a permanent home leads the Department to infer that you accepted a Fiji domicile. If so, your continuance in Fiji after British annexation makes your domicile British, and under these circumstances it is not thought that you can lay claim to the diplomatic intervention of this Department.

"It was held in a recent case that, if a domicile in New Mexico was proved to have attached to a British subject there resident, this excluded such party from the right to appeal to British intervention for redress for wrongs inflicted on the party in New Mexico. The same principle rules the present case.

"No doubt the grievances of which you complain entitle you to much sympathy, but, if domiciled in Fiji, your redress must now be sought from the British Government, either because it sanctioned such injuries or because it stands in the place of the Fiji authorities, by whom they were perpetrated."

Mr. Porter, Acting Sec. of State, to Mr. Burt, July 11, 1885, 156 MS. Dom. Let. 232.

The United States subsequently presented to the British Government a claim for the alleged wrongful disallowance by the British colonial authorities, after the annexation of the Fiji Islands to the British Crown, of Mr. Burt's title to the lands above referred to. The British Government having referred to the letters of Mr. Fish and Mr. Porter, above quoted, the Department of State communicated to the British Government a memorandum in which the objections made in those letters were answered. In this memorandum it was stated that the observation made by Mr. Fish related to another and different case, namely, a claim made by Mr. Burt for property destroyed in Fiji by the natives before annexation, almost ten years before the disallowance of Mr. Burt's title by the colonial authorities. Besides, said the memorandum, Mr. Fish was not in possession of all the facts and circumstances that had since come to the knowledge of the Department. Among the circumstances were the facts that Mr. Burt had rendered important service to his country in the Mexican War and afterwards on the Pacific coast, and that through such service he incurred physical disability which would have rendered him unfit for military service in the Civil War, and that he went to the South Sea islands on the advice of a physician. The memorandum also cited the opinion of Lord Campbell in *Beattie v. Johnson*, 10 Cl. & Fin. 139, to the effect that a change of domicil does not necessarily effect a change of national character, and that "there may be cases in which even a permanent residence in a foreign country, occasioned by the state of health, may not operate a change of domicil." Moreover, said the memorandum, when the claim for the disallowance of Burt's title was presented, he was then and still continued to be a citizen of the United States domiciled in the District of Columbia. The same observations, said the memorandum, applied equally to the letter of Mr. Porter.

Memorandum accompanying instruction of Mr. Hill, Act. Sec. of State, to Mr. Choate, ambass. to England, Oct. 31, 1899, S. Doc. 140, 56 Cong. 2 sess. 55-57, 68, 70.

The rule that persons who take up an apparently permanent abode in a foreign country are not entitled to diplomatic protection, does not apply to persons who go abroad for reasons of health and remain



abroad many years, hoping to come back, yet prevented from doing so by continuing illness. "In one recent case in New York it was held that a lady whose residence in the south of France had for these reasons continued for over twenty years had not lost her New York domicil, and that her personal property was to be distributed according to the law of that domicil. In the rightfulness of this and kindred rulings I entirely concur, and I hold that as American domicil is in such cases retained so is American nationality, entitling such parties to the protection due to citizens of the United States."

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Oct. 12, 1887, For. Rel. 1887, 1073.

The New York case above referred to doubtless is that of Dupuy v. Wurtz (1873), 53 N. Y. 556.

See to the same effect, Mr. Evarts, Sec. of State, to Mr. White, min. to Germany, No. 12, June 6, 1879, MS. Inst. Germany, XVI. 460; Mr. J. Davis, Act. Sec. of State, to Mr. Barnett, consul at Paramaribo, Aug. 20, 1884, 111 MS. Inst. Consuls, 413.

(5) RESIDENCE IN ORIENTAL LANDS.

§ 478.

The rule that the right to diplomatic protection is lost by an apparently permanent residence abroad "does not apply to American communities settled as such in Oriental lands and recognized in their distinctively national character by the system of government prevailing in such lands."

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switzerland, Oct. 12, 1887, For. Rel. 1887, 1073, 1074.

It applies, however, to the return of a native to such a country. (Mr. Rockhill, Assist. Sec. of State, to Mr. Burke, No. 51, Dec. 29, 1896, 154 MS. Inst. Consuls, 682.)

As to national character in the East, see Abdy's Kent (1866), 224.

"The doctrine of implied renunciation of citizenship by continuous residence in a foreign country does not completely apply to countries where citizens of the United States enjoy extraterritoriality. In such countries they live under the protection, more or less, of their own Government, and are answerable to its laws. Consequently they are generally held to retain their American domicil."

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, consul-general at Apla, March 6, 1888, S. Ex. Doc. 31, 50 Cong. 2 sess. 34.

"In your No. 20, of August 20, 1887, you report your action in declining to grant a passport in the case of Alexander Hatchdoorian.

"The facts appear to be these: The applicant, Alexander, is the son of Serkis Hatchdoorian, an Ottoman subject by birth, who emigrated to the United States, and was naturalized by the United States circuit

court at Boston on June 14, 1854. In 1856 he returned to Turkey bearing a passport dated September 12 of that year, and has since resided there, claiming American citizenship, and being registered at the American consulate. It is not stated that he has at any time returned to the United States or expressed any intention or made any effort to return, or that he is engaged in any business in Turkey which keeps him there as the representative of American interests, or that he is a member of any particular American community in Turkey recognized in Turkey as having distinctive and continuous American privileges.

"Alexander, the son, the present applicant, was born in Turkey on January 1, 1865, and therefore attained his majority on January 1, 1886. He has never resided in the United States, and now seeks a passport, not for the purpose of adopting a permanent domicil in this country or assuming any duties of such citizenship, but simply for the purpose of 'visiting it sometime.' Under these circumstances he falls within the rule repeatedly laid down in this Department that when a foreigner, after naturalization in the United States, returns to his native land and there, after merging himself in the society and nationality of that land, has a son, that son, should he remain there till his majority, is required, in order to have the protection of American nationality, not merely to elect American citizenship, but to carry that election out by taking immediate measures to come to the United States as a permanent abode. The latter condition does not exist in the present case, and therefore I am of opinion that the passport applied for by Alexander was properly refused by you.

"From what has been said you will see that, while reiterating this rule, I am careful to exclude from its operation cases of persons who, with their families, remain in Turkey as the representatives of distinctively American business interests, and of persons belonging to particular American communities settled in Turkey, whose right to preserve a distinctive corporate and continuous American nationality is recognized by Turkey, and was affirmed by me in instructions to you, No. 7, of April 20, 1887, and repeated by me in instructions to W. C. Emmet, United States consul at Smyrna, inclosed in instructions to you, No. 37, of August 11 last. But the present applicant does not claim to fall within either of these classes, and is not, therefore, so far as the case presented by him shows, entitled to the immunities assigned to them."

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, Sept. 30, 1887, For. Rel. 1887, 1131.

As to a somewhat analogous case, -see For. Rel. 1886, 303.

"I have to acknowledge the receipt of your No. 232, of the 20th ultimo, whereby you ask to be furnished with specific instructions as

to the measure of protection to be accorded by the legation in the cases of Armenians who have become naturalized in the United States and return to travel in Turkey under the guise of Ottoman subjects.

"The power of the agencies of the United States to protect American citizens in their just international rights can only be exercised in good faith and upon proof of the good faith of the party claiming protection. It is not to be abused by such duplicity as you report. As long ago as 1874 Mr. Fish said:

"For a naturalized citizen may, by returning to his native country and residing there with an evident intention to remain, or by accepting offices there inconsistent with his adopted citizenship, or by concealing for a length of time the fact of his naturalization and passing himself off as a citizen or subject of his native country until occasion may make it his interest to ask the intervention of the country of his adoption, or in other ways which may show an intent to abandon his acquired rights, so far resume his original allegiance as to absolve the government of his adopted country from the obligation to protect him as a citizen while he remains in his native land.' (Consular Regulations, 1874, paragraph 110.)

"This Government does not hold to the doctrine of perpetual allegiance, nor does it contest the right of any citizen of the United States to voluntarily perform any act by which he may become a citizen or subject of a foreign state according to its laws. The return of a naturalized Turk to Turkey, as an Ottoman subject, under Turkish passport, and with submission to Turkish authority over him as a subject, clearly dissolves the obligation of his adopted country to protect him longer as a citizen, and the obligation can certainly not be revived by the assertion or admission of the individual that his reassumption of his original allegiance has been colorable merely and in bad faith, with deliberate intent to deceive. The agencies of the United States in Turkey can not be privy to such a deception."

Mr. Uhl, Acting Sec. of State, to Mr. Riddle, chargé at Constantinople, May 10, 1894, For. Rel. 1894, 761, in relation to the case of Garabed M. Mourad, who apparently hoped "to return to and remain in Turkish jurisdiction as a Turkish subject until it may be convenient for him either to claim an American citizen's right to quit Turkey or to invite expulsion as an objectionable alien."

See, also, Mr. Fish, Sec. of State, to Mr. Hall, May 3, 1869, S. Ex. Doc. 108, 41 Cong. 2 sess. 201, 202; case of *J. B. Lacoste v. Mexico*, Moore. Int. Arbitrations, III. 2561.

The concealment of American citizenship, on the return of a naturalized citizen of the United States to his native country, is a

circumstance which may affect his right to claim the protection of the United States.

Mr. Gresham, Sec. of State, to Mr. Terrell, min. to Turkey, July 11, 1894, For. Rel. 1894, 733, 735.

“Where you are satisfied that aliens, Russians or others, have acquired American citizenship with an obvious purpose of withdrawing themselves from their new allegiance and colonizing in Syria, you should meet any application on their part by informing them that their course is tantamount to a voluntary renunciation of right to protection as citizens while so establishing their domicile abroad.”

Mr. Rockhill, Act. Sec. of State, to Mr. Khouri, No. 45, Sept. 29, 1896, 154 MS. Inst. Consuls, 35.

A native of Turkey who had been naturalized in the United States “could not receive any protection from this Government in the event of his returning to his native country as a Turkish subject.”

Mr. Moore, Assist. Sec. of State, to Mr. Smith, June 8, 1898 229 MS. Dom. Let. 229. See, also, Mr. Hill, Act. Sec. of State, to Mr. Griscom, chargé, No. 354, Feb. 16, 1901, *supra*, § 475, p. 771.

“Your dispatches Nos. 18, 20, 23, and 34, diplomatic series, of the respective dates of February 23 and 27, and March 1 and April 29, have been received. They report the case of Hajie Seyyah, stated to be ‘in asylum’ at your legation, and ask instructions in the matter.

“Briefly, Mirza Mohamed Aly, otherwise styled Hajie Seyyah, a native Persian, appears to have been admitted to American citizenship by the fourth district court of San Francisco, June 11, 1875. Soon afterwards he quitted the United States, went to India, where he amassed some fortune, and thence returned to Persia, where he has invested his means in the purchase of two villages, aggregating some thirty families. He is a ‘Mollah,’ or Mohammedan priest of high rank. He has two wives, one of whom is a relative of the Shah. He appears to be domiciled in Persia, and to have fully adopted Oriental customs and life. He has never had an American passport, and until a very recent date would seem to have made no assertion of the status he acquired by naturalization in the United States.

“Having shared, to some extent, in the recent political agitation of a seditious nature, initiated by Malcolm Khan, and having had seditious publications addressed to him, he was some two years since arrested and imprisoned in various places for nearly twenty months. On his release he found his affairs involved, one of his villages having been robbed, fields taken from him, and debts due him withheld.

“Seeking redress, restitution of the realty was effected, but he

seems to have been unable to collect the moneys owing to him. At this juncture he sought your assistance in the recovery of these debts, alleging his American citizenship, and you addressed the prime minister asking that justice be done him. The minister denied your right to intervene, asserting that under Persian law, fortified by certain treaty provisions with Russia, which are held to constitute the measure of privilege under the most favored nation clause of our treaty with Persia, Hajie Seyyah's naturalization is invalid, because he emigrated without his sovereign's consent. Fearing arrest (for what cause is not shown), Hajie Seyyah appealed to you for shelter, and became an inmate of your legation, nominally as a salaried servant. As the result of several interviews had by you with the Persian authorities, orders have been issued permitting this person to return unmolested to his villages, but his status as a naturalized citizen and his 'asylum' in your legation had been formally denied; and the relief reported in your No. 34 is unaccompanied by any admission in these regards.

"Hajie Seyyah has expressed a wish to return to the United States.

"Two distinct and somewhat conflicting questions appear to be involved—Hajie Seyyah's claim to protection as an American citizen, and his claim to enjoy asylum against process of Persian law. As to the first, the uniform rules and precedents of this Government make Hajie Seyyah's claim to protection as a *bona fide* citizen of the United States extremely doubtful. He quitted this country soon after having been naturalized, and has lived abroad, latterly in his native land, some seventeen years, without manifesting his American citizenship or performing its duties. His domicile, interests, membership in a purely oriental hierarchy, mode of life, and polygamous marriage suggest no affiliation with the social organization of this country. Were he within the jurisdiction of the United States, he would be amenable to criminal process for bigamy.

"All the circumstances of his case suggest a merely colorable acquisition of American citizenship for the purpose of evading the obligations of his original Persian allegiance, and were he an applicant for a passport as a citizen of the United States you would be unhesitatingly instructed to decline its issuance. . . .

"You make the point that the question whether Hajie Seyyah is in fact a Persian subject, is the vital issue in the case. The effect of naturalization under the laws of the United States, is no wise dependent upon or affected by the laws of the alien's country. So far as we are concerned, it is perfectly immaterial whether Hajie Seyyah had or had not the Shah's permission to emigrate, if he be lawfully admitted to American citizenship; and his rights would be effectively respected in the United States and protected in a third country. But when he voluntarily returns to his native country, presumably knowing the

law thereof in this regard, he becomes the subject of a conflict of laws. The legality of his naturalization in the United States is not to be questioned except by allegation of fraud in its procurement, which does not enter into the present case.

"The claim of the Persian minister that the naturalization here is not valid, because lacking the prior consent of Persia, can not be admitted, but on the other hand and in the absence of a treaty of naturalization, its validity may not be practically enforceable in Persia against the counter claim of that Government, that under its law the man has not lost his original allegiance.

"The emigration treaty of July 3, 1844, between Russia and Persia, which the minister invokes, has no relation whatever to the naturalization of Persians according to the laws of the United States; for the widest expansion of the favored-nation doctrine could not make a treaty between two foreign states the measure of the validity of a judicial act done in the United States in conformity to our municipal law.

"To sum up, I have no hesitancy in regarding as unworthy the claim of Hajie Seyyah to be protected as a person who has *bona fide* conserved the rights and discharged the reciprocal duties of American citizenship, however lawful be the act of his naturalization."

Mr. Gresham, Sec. of State, to Mr. Sperry, min. to Persia, May 17, 1893, For. Rel. 1893, 498.

Mr. Sperry, in communicating this decision to the Persian prime minister, said: "My Government decides that Hajie Seyyah is not a citizen of the United States, on the ground that the rights which he acquired by . . . naturalization . . . have been lost because he never made any use of these rights." (For. Rel. 1893, 500.)

With reference to this statement, the Department of State directed that the Persian Government be advised: "The Department did not decide whether Hajie Seyyah had lost his United States citizenship, still less whether he had become reclothed with Persian citizenship. According to instruction No. 33, in the absence of evidence that Hajie Seyyah had *bona fide* conserved American citizenship, he could not be regarded as entitled to the protection of the United States, while continuing to dwell in the land of his origin; nor is there anything in that instruction to sustain the terms of Mr. Sperry's conclusion. Naturalization being a judicial act, the executive branch is without competence to annul a decree of naturalization, and can not declare forfeiture of citizenship in the absence of legislation to that end." (Mr. Adee, Acting Sec. of State, to Mr. McDonald, min. to Persia, Sept. 21, 1893, For. Rel. 1893, 501.)

## 2. OFFICE HOLDING.

### § 479.

"When an alien is at the very time of his naturalization, and for years before has been, a resident and office-holder in the country of his origin, when after his naturalization he puts his certificate in his

pocket and returns to the country of his origin, and continues to reside there in business and holding office, the President feels it to be his duty to afford to such a citizen only the measure of protection demanded by the strictest construction of duty, namely, that he shall receive from the hands of the Government under which he is holding office the measure of protection which it affords to its own citizens or subjects."

Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, April 25, 1882, For. Rel. 1882, 230, 231.

In this case the naturalization was performed under § 2166, R. S., relating to the naturalization of persons who have served in the armies of the United States. With reference to the foregoing extract, it is to be observed that Mr. Frelinghuysen, as appears by the text of the instruction, construed § 2166 as requiring the court to grant naturalization, without regard to the time when the service was rendered, and without regard to the fact that the applicant had meanwhile "abandoned the country and was in business in a foreign land, and holding office there with every apparent purpose of remaining there permanently." Mr. Frelinghuysen declared, indeed, that an act of naturalization under such circumstances, which were those of the case before him, was "only just within the letter" and "wholly outside the spirit and intent of the naturalization laws." But, as he considered it to be within the letter, he seems further to have held that there should in consequence be allowed in such a case, after naturalization, a latitude of action not enjoyed by persons admitted to citizenship under other provisions of law, and amounting to an exemption from the ordinary presumptions with regard to the renunciation of adoptive nationality by return to and residence in the land of origin.

That this was assumed to be so seems to be indicated by the decision in another case in the same instruction, presenting similar features as to residence and office-holding in the country of origin, but where the naturalization was granted under the ordinary conditions. In this case it was held that the most the United States could do was to insist that the person "should have a right to return to the country of his adoption, leaving the question of damages for future discussion."

"When a naturalized citizen resumes his residence with his family in the land of his origin, and goes into business there, and becomes an office-holder, and takes active part in political discussions, if it turns out that his action gives offense to the local government, and he is thrown into prison, the laws and interests of the United States do not require us to do more than insist that he shall have a right to return to the country of his adoption, leaving the question of damages for future discussion.

"Such is understood to have been the course pursued by the United States during the late civil war. In September, 1862, the British chargé d'affaires at Washington requested the discharge of one Francis Carroll, a British subject, who had been arrested by the military

authorities in Baltimore. Mr. Seward refused the request, and in a note to Mr. Stuart said:

“‘Is the government of the United States to be expected to put down treason in arms and yet leave persons on liberty who are capable of spreading sedition? . . . Certainly the government could not expect to maintain itself if it allowed such mischievous license to American citizens. Can the case be different when the dangerous person is a foreigner living under the protection of this government? I can conceive only one ground upon which his release can be ordered, and that is that he may be too unimportant and too passionate a person to be heeded in his railings against the government. But you will bear in mind that the times are critical, and that sedition is easily moved now by evil-designing men who in times of peace might be despised.’ (Dip. Cor. 1862, p. 228.)

“A correspondence ensued, which resulted in a proposal that—

“‘Mr. Carroll should be released from custody upon his agreeing to leave the United States immediately, and not return again during the continuance of this rebellion, and giving security to the approval of the United States marshal that he will keep said agreement.’ (Dip. Cor. 1863, p. 460.)

“This offer was accepted by the British chargé d'affaires, and Mr. Carroll was discharged.”

Ir. Frelinghuysen, Sec. of State, to Mr. Lowell, min. to England, April 25, 1862. For. Rel. 1862, 230, 231.

“Your letter of the 21st ultimo, addressed to the President, has been transmitted to this Department for reply. You state in substance that you have been selected by citizens of Bluefields, Nicaragua, as a member of the local municipal council of that city; that, among other powers, to this council will be intrusted the imposition of taxes for the local government; that by the exercise of economy and good judgment the same may be lightened, trade revived, and confidence restored, and thereby the condition of American interests in Bluefields will be much benefited and the property of Americans rendered of greater value than at present. You further state that, if good citizens will not accept these positions, then irresponsible parties, having no property to be affected, will be selected with attending results inimical to business and property. You inquire whether by accepting such a place in the municipal government, you will lose the benefit of protection by this Government as an American citizen.

“In reply I have to say that, in view of the fact that you are domiciled in Nicaragua, not for the purpose of a permanent residence, but with the intention of returning to the United States, and in view also of the importance of American investments in Bluefields, which so largely predominate there, and that American citizens thus interested



naturally have a deep concern in the matter of local taxation and good municipal administration, I am of the opinion that to accept the position for which you have been selected, and to act as one of the municipal council aforesaid, recognized by the Government of Nicaragua, will not operate to forfeit the protection to which American citizens in a foreign jurisdiction are entitled, but that such protection would be extended, subject, however, to the limitations and conditions applicable to those so situated; that whatever is done must be in the light of the Nicaraguan constitution and Nicaraguan laws, and with a view also of the possible results consequent upon any internal dissensions that may occur, or changes of Nicaraguan authority against which this Government can not provide."

Mr. Uhl, Act. Sec. of State, to Mr. Well, Oct. 4, 1894, 199 MS. Dom. Let. 60.

"While it was the opinion of this Government at the time that if Mr. Wiltbank, without having taken any part in the insurrection, accepted office under an insurrectionary authority for the sole purpose of protecting the community and preserving order during the supremacy of a *de facto* government which he was unable to resist, he was not guilty of any hostile act to the Government of Nicaragua which would justify his expulsion, the fact yet remains that, from the point of view of Nicaragua, at the time Mr. Wiltbank was arrested and forcibly sent away, he was one of the officers of a revolutionary government which had seized upon the reins of sovereign authority within the territory and political jurisdiction of Nicaragua. His motives and the limits within which he had acted may not have been known to the Nicaraguan authorities until they were shown by this Government, when Mr. Wiltbank was permitted to return to his home and resume his business.

"The Department has decided that Mr. Wiltbank is not entitled to exemplary damages or indemnity for personal suffering or inconveniences attending his expulsion. He makes no claim for actual pecuniary loss resulting therefrom. If he will show that the action of the Government of Nicaragua in this matter caused him a direct property loss, whether by destruction of his property or otherwise, the Department will consider the claim anew. Remote or consequential damages, however, can not be taken into consideration."

Mr. Rockhill, Act. Sec. of State, to Messrs. Phillips & McKenney, Sept. 1, 1896, 212 MS. Dom. Let. 300.

"Von Werthen and Juen have both held official position under the Hawaiian Government—the former as a detective under the provisional government and the latter as a custom-house officer and police captain under the monarchy, and again as a police captain under the

provisional government. The acceptance of civil office in a foreign country indicates such an identification of the person accepting it with the country he serves as to raise serious doubts whether he can rightfully claim, as against that country, the protection of his original nationality."

Mr. Uhl, Act. Sec. of State, to Mr. Willis, Min. to Hawaii, May 14, 1895, For. Rel. 1895, II. 854, 855.

Responding to an inquiry whether an American citizen would lose his citizenship by being elected to a position under a city government in Cuba, the Department of State said: "If, in accepting the office, you do not take an oath of allegiance to a foreign state, nor renounce allegiance to the United States, the mere acceptance of the municipal office under the present régime in Cuba would not forfeit your American citizenship. But should you remain permanently in Cuba, and, at some future time, claim the protection of the United States, your acceptance of the office would be a circumstance which might have some bearing on the question whether you had abandoned the right to claim American protection."

Mr. Hill, Assist. Sec. of State, to Mr. Lombard, May 12, 1900, 245 MS. Dom. Let. 189.

### 3. TAKING PART IN POLITICS.

#### § 480.

"While the bare fact of his American citizenship may not be in doubt, the attendant circumstances of his case are not such as to very strongly impress the Department that his acts in Costa Rica were altogether those of a bona fide, peaceful, law-abiding citizen of this country; and unless other facts, not known to the Department now, shall be adduced to show that the conduct of Mr. ——— since his naturalization has not only been that of a good American citizen, but also entirely disconnected from the internal politics of Costa Rica, it is not seen that his claim could, with propriety, be very earnestly urged. You may therefore let it rest for the present."

Mr. Evarts, Sec. of State, to Mr. Logan, No. 28, Oct. 23, 1879, MS. Inst. Cent. Am. XVIII. 47.

See, also, Mr. Blaine, Sec. of State, to Mr. Logan, March 9, 1881, *Id.* 159.

Certain persons having in the character of citizens of the United States preferred claims against the Hawaiian Government for their alleged arbitrary arrest and detention for connection with the attempted rising of January, 1895, the Department of State observed that all of them, with one exception, "were living in Hawaii at the

time of the subversion of the monarchy and of the election held in May, 1894, for members of the constitutional convention. Leaving out of view for the moment other tests of their bona fide American citizenship or their right to American protection, it is important to ascertain whether they took the oath required for participation in that election or did actually participate in the same. You are desired to inform yourself accurately on this point and communicate the result to the Department."

Mr. Uhl, Acting Sec. of State, to Mr. Willis, min. to Hawaii, May 14, 1895, For. Rel. 1895, II. 854, 855.

"John Mitchell was admitted, it appears, to special rights of citizenship under a provision of the new constitution of Hawaii, conferring such rights on persons who actively participated or otherwise rendered special service in the formation of the provisional government. Having thus personally taken part in the subversion of one government and the establishment of another in a foreign country, it is questionable whether he has not so completely identified himself with the government which was finally established, as to have lost his right to American protection, notwithstanding he appears to have intended to reserve that right."

Mr. Uhl, Acting Sec. of State, to Mr. Willis, min. to Hawaii, May 14, 1895, For. Rel. 1895, II. 854, 855.

Mr. Mitchell had invoked the intervention of the United States in respect of a claim against the Hawaiian Government growing out of his alleged arbitrary arrest for connection with the attempted revolt of January, 1895.

See, in this relation, the case of the Hahnville lynching, under Declaration of Intention, *supra*, § 387.

#### 4. UNNEUTRAL CONDUCT.

##### § 481.

Acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty and against the public peace, are offenses against the United States when committed within the territory or jurisdiction thereof, and as such are punishable by indictment in the district or circuit courts. The *high seas* being within the jurisdiction of the district and circuit courts, such an offense committed thereon is cognizable by said courts. Where such an offense is committed out of the jurisdiction of the United States the offenders must be dealt with abroad, and, after proclamation by the President, will have forfeited all protection from the American Government.

Bradford, At. Gen., 1795, 1 Op. 57. See, generally, as to the effect of claimants' misconduct, *infra*, §§ 975-977.

The British Government acquiesced in the execution of Arbuthnot and Ambrister by General Jackson in Florida in 1818, on the ground that, by going to Florida and entering into the service of parties engaged in attacks on a friendly power, they had forfeited the right to claim the protection of the British Government.

Schouler's Hist. of the United States, III. 72 et seq.

Accompanying the Texan expedition to Santa Fé, when it was captured by the Mexican authorities, there were certain citizens of the United States, who, it was alleged, were not parties to the expedition so far as it was military and hostile to Mexico, but accompanied it only as traders or travellers or in other noncombatant characters, but who were nevertheless taken and held as prisoners and subjected to grave ill-treatment. It was conceded by the United States that the fact of having been found in arms, with others admitted to be armed for belligerent purposes, raised a presumption of hostile character; but it was maintained that this presumption might be rebutted, especially where the journey lay through a wild country where traders and travellers were obliged to be armed for defence. The Government of the United States, therefore, in the case of one of the persons above referred to, being satisfied of his innocence, demanded his release both on that ground as well as on the ground of his maltreatment. It was added, however, that, if the Government of Mexico insisted upon detaining any of the persons in question for further inquiry, they should while so detained be permitted to enjoy to the fullest extent the rights of prisoners of war, and that, in case an assurance of such treatment should not be given, official intercourse with the Mexican Government should be suspended.

Mr. Webster, Sec. of State, to Mr. Thompson, min. to Mexico, April 15[5], 1842, 6 Webster's Works, 427.

See, also, Mr. Webster, Sec. of State, to Mr. Ellis, min. to Mexico, Jan. 3, 1842, 6 Webster's Works, 422.

A citizen of the United States who in a foreign country joins as a combatant a hostile expedition there set on foot against another country, and is captured by the authorities of the latter within its jurisdiction, forfeits his claim to the protection of his own government. (Mr. Webster, Sec. of State, to Mr. Peyton, Jan. 6, 1842, 32 MS. Dom. Let. 140. An extract from this letter may be found in 6 Webster's Works, 425.)

By a proclamation issued in 1849, President Taylor, referring to the report that an armed expedition was about to be fitted out in the United States for the invasion of Cuba or of some of the provinces of Mexico, warned "all citizens of the United States who shall connect themselves with an enterprise so grossly in violation of our laws and our treaty obligations that they will thereby subject themselves to the heavy penalties denounced against them by our acts of Con-

gress and will forfeit their claim to the protection of their country. No such persons," he added, "must expect the interference of this Government in any form on their behalf, no matter to what extremities they may be reduced in consequence of their conduct."

Proclamation of President Taylor, Aug. 11, 1849, Richardson's Messages, V. 7.

In a proclamation issued in 1851, President Fillmore declared that there was reason to believe that a military expedition, instigated and set on foot chiefly by foreigners, was about to be fitted out in the United States for the invasion of Cuba; that such expeditions could be regarded only as adventures for plunder and robbery; and that they were, besides, expressly prohibited by the statutes of the United States. He therefore warned "all persons" who should "connect themselves with any such enterprise or expedition, in violation of our laws and national obligations," that they would "thereby subject themselves to the heavy penalties denounced against such offences, and will forfeit their claim to the protection of this Government or any interference in their behalf, no matter to what extremities they may be reduced in consequence of their illegal conduct."

Proclamation of President Fillmore, April 25, 1851, H. Ex. Doc. 2, 32 Cong., 1 sess., part 1, 27; Richardson's Messages, V. 111.

"Although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures; and any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent."

Opinion of Hassaurek, U. S. Comr., for the Commission, in the cases of the *Medea* and *Good Return*: Convention between the United States and Ecuador, Nov. 25, 1862, Moore, Int. Arbitrations, III. 2729, 2736.

See, to the same effect, opinion of Sir Frederick Bruce, umpire, U. S. and Colombian Claims Commission, convention of Feb. 10, 1864, Moore, Int. Arbitrations, III. 2740-2743; and opinion of Findlay, U. S. Comr., for the Commission, convention between the United States and Venezuela, Dec. 5, 1885, Moore, Int. Arbitrations, III. 2743-2751.

A citizen of the United States who voluntarily enlists in a foreign army has no claim on this Government to intervene to procure his discharge.

Mr. Fish, Sec. of State, to Mr. Bliss, Nov. 4, 1872, MS. Inst. Mex. XVIII. 340.

For cases on this subject, see Moore, Int. Arbitrations, III. 2467-8, 2752. That a citizen of the United States enlisted in the service of a foreign belligerent can not claim the interposition of his own Government for redress for injuries suffered by him in such service, see Mr. Fish, Sec. of State, to Mr. Williams, July 29, 1874, quoted supra, § 225.

“A party whose goods are confiscated as tainted with insurgency can not claim compensation if he was himself implicated in such insurgency.”

Mr. Bayard, Sec. of State, to Mr. Muruaga, Span. min., Dec. 3, 1886, For. Rel. 1887. 1015, 1019.

It was reported in 1893 that Dr. Charles E. Boynton, a citizen of the United States, had been arrested at Rio de Janeiro and was in danger of execution on account of some act committed during the insurrection then existing in that quarter. The report proved to be erroneous. The facts appear to be that Dr. Boynton attempted, in the interest of the Brazilian Government, to use a torpedo against the revolted vessels of the Brazilian navy, employing for that purpose a small tug, over which he unlawfully hoisted the British flag. The commander of the British naval forces, seeing the British flag so used, seized the tug, but, finding that its master was an American citizen, turned him over to Captain Picking, of the U. S. S. *Charleston*, who reported the matter and was directed to hold Dr. Boynton till further orders. Captain Picking was afterwards directed to send him home, on sufficient funds being provided to pay his passage.

Mr. Adee, Second Assist. Sec. of State, to Miss Boynton, Oct. 21, 1893, 194 MS. Dom. Let. 76.

##### 5. FUGITIVES FROM JUSTICE.

##### § 482.

J. H. Mears, in view of the fact that he participated “in the enormous fraud perpetrated by Gardiner and others,” and in view of other circumstances of his case, “ought not to have expected any interference in his behalf by this Government on account of his alleged maltreatment by Mexico, for he certainly has no claim to it. It is not over criminals or fugitives from justice in foreign countries, though they may have been born or naturalized in the United States, that this Government is bound to throw the shield of its protection whenever they see fit to call on it to do so. It is to our citizens abroad for honest purposes, who still look to the United States as their home to which they intend to return, or in other words, to those who are still under allegiance to this Government, or have a domicile here, that our

Government extends its care, and will offer, when occasion requires, its guardian protection."

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII. 54. As to the case of Mears and Gardiner, see Moore, Int. Arbitrations, II. 1255, 1265.

"As a general principle, a fugitive from justice can not appeal for protection to the justice from which he flies. Thus, it is a familiar rule that a convict can not take out a writ of error, when a fugitive from justice. It might therefore be said that until Winslow shall have submitted himself to the justice of his native land, the laws of which he is charged with violating, he is not in a position to appeal to their protection against the justice of a foreign land. A passport, which is the primary form and evidence of protection given to a citizen by his government, has frequently been denied to persons residing in a foreign land, in contumacy or violation of the laws of the United States. Were Winslow merely an applicant for a passport, the fact that he is a contumacious fugitive from the justice of Massachusetts would be a sufficient reason for denying to him that evidence of the reciprocal duty of the law-abiding citizen and obligation of his Government. It does not, however, appear necessary to rest a conclusion in the present case upon this argument."

Mr. Bayard, Sec. of State, to Mr. Hanna, min. to Arg. Rep., No. 22, June 25, 1886, MS. Inst. Arg. Rep., XVI. 385.

This instruction related to an application of "D. Warren Lowe," apparently Ezra D. Winslow, for the intervention of the United States in certain bankruptcy proceedings in which he had become involved in the Argentine Republic. The decision of the Department of State not to intervene rested not only upon the ground above stated, but also upon the ground that he had abandoned the United States and settled in the Argentine Republic *animo manendi*.

Winslow seems to be judicially domiciled in Massachusetts. (*Cobb v. Rice*, 130 Mass. 231.)

#### 6. QUESTION OF MATRICULATION.

#### § 483.

"The matriculation of foreigners as defined in article 21 of this chapter [iii., of the law of Salvador, of Sept. 27, 1886] is an inscription of their names and nationalities in a book kept for that purpose in the department for foreign affairs. In order to be so registered, they must produce to that department certain evidence, prescribed by law, of their right to the national status claimed. If the requisite evidence be exhibited, the name and nationality of the applicant are registered, and in proof of this, he is given a certificate of matriculation, which is, however, only *prima facie* evidence of his national status. But without this certificate no authority or public

functionary of Salvador is permitted to recognize a foreigner's nationality (Chapter III. article 26).

"Upon the score of mere convenience it is evident how inexpedient as a matter of policy, in the present age of enlarged and liberal intercourse and of extensive commercial transactions, are municipal regulations which tend to impede and restrict the movements and business operations of foreigners.

"But the law in question, as understood by this Department, goes beyond considerations of convenience, and raises important questions of international right. By article 28, Chapter III., it is provided that matriculation concedes privileges and imposes special obligations which are called by the laws of the Republic 'the rights of foreigners.' These rights of foreigners, as stated in article 29 of the same chapter, are as follows:

"(1) To appeal to the treaties and conventions existing between Salvador and their respective governments.

"(2) To have recourse to the protection of their sovereign through the medium of diplomatic representation.

"(3) The benefit of reciprocity.

"Unless a foreigner possesses a certificate of matriculation, no authority or public functionary of Salvador, as has been seen, is permitted to concede to him any of these rights; and it is further provided in article 27 of the chapter in question, that the certificate of matriculation shall not operate retroactively upon a claim of right arising anterior to the date of matriculation. Thus the object and purport of the law in question is to make the enjoyment and assertion by a foreigner in Salvador of the consequent rights and privileges of his national character, whether they are guaranteed by treaty or secured by the general rules of international law, conditional upon his contemporaneous possession of a paper prescribed by the municipal law of the country as the proper proof of his citizenship.

"In order to appreciate the significance of such a requirement, it is only necessary to consider that, if admitted, its effect would be to leave the question of the national status of a foreigner wholly to the determination of the Salvadorian authorities, and that, in the event of his failure to exhibit such proofs of citizenship as they may deem sufficient, his right to claim the protection of his government would be lost. Conversely the right of his government to interpose in his behalf would also be destroyed; for to deny to a foreigner recourse to his government, by necessary implication, questions and denies the right of that government to intervene.

"Thus, by making the compliance of a foreigner with a municipal regulation a condition precedent to the recognition of his national character, the Salvadorian Government not only assumes to be the



sole judge of his status, but also imposes upon him as the penalty of noncompliance a virtual loss of citizenship.

"Nothing would seem to be required beyond the mere statement of these propositions, fully sustained as they appear to be by the context of the law in question, to confirm the conviction that its enforcement would give rise to continual and probably grave controversies. Such has been the result of the occasional attempts elsewhere than Salvador to enforce similar regulations, and such would seem to be the necessary result of the attempt of particular governments to enforce laws which operate as a restriction upon the exercise and performance both by states and by citizens of their relative rights and duties, according to the generally accepted rules of international intercourse. Such intercourse should always be characterized by the utmost confidence in the good faith of nations, and by the careful abstinence of each from the adoption of measures which, by operating as a special restriction upon the action of other governments in matters in which they have an important if not the chief concern, seem to imply distrust of their intentions. It is proper to observe that the Government of Mexico, guided by the experience of an ample trial of her law of matriculation, modified it in June last by the repeal of those provisions which made the matriculation of foreigners compulsory and a condition of the exercise of their right of appeal to their government.

"It may be said that the question of citizenship is one which peculiarly concerns the government whose protection is claimed and in the decision of which that government has a paramount sovereign right. This results not only from the relation of a government to its citizens, but from the fact that international law recognizes the right of each state to prescribe the conditions of citizenship therein and regulate for itself the process whereby foreigners may, if they so desire, expatriate themselves and become naturalized. In the United States this process is defined by a statute, the administration of which is committed to the courts, who issue to the naturalized citizen certain evidence of his compliance with the law. The efficiency of this law, the basal principle of which is the voluntary action of the alien, is fully recognized by all states that concede the right of expatriation, and among these is Salvador.

"The principle and validity of our naturalization law being thus admitted, it would seem that the mere question of its administration and of the proper evidence of its administration was one for the determination of this Government. But by the matriculation law of Salvador that Government is made the first and the final judge of the sufficiency of the evidence of American citizenship, even in the case of a naturalized citizen of the United States not of Salvadorian origin. . . .

“The effect of the Salvadorian statute in question is to invest the officials of that Government with sole discretion and exclusive authority to determine conclusively all questions of American citizenship within their territory. This is in contravention of treaty right and the rules of international law and usage, and would be an abrogation of its sovereign duty towards its citizens in foreign lands to which this Government has never given assent.”

Mr. Bayard, Sec. of State, to Mr. Hall, min. to Cent. Am., Nov. 29, 1886, For. Rel. 1887, 78. For the text of the law, see *id.* 69.

Jan. 7, 1887. Mr. Hall addressed to Señor Delgado, Salvadorian minister of foreign affairs, a note in the sense of the foregoing instructions. (For. Rel. 1887, 111.)

For other cases under this head, see *infra*, §§ 542, 919.

“I do not believe that the fact of imposing upon foreigners the obligation to matriculate leaves the determination of their nationality to the arbitrament of the Salvadorian authorities.

“According to article 22 of the law referred to, the foreigner who presents a certification of the respective diplomatic or consular agent accredited in the Republic, in which it is set forth that the party interested is a native of the country represented by such agent, or the authenticated passport upon which the applicant has entered the Republic, or the certificate of naturalization, also duly authenticated, has the right to be inscribed in the books of matriculates. From this provision it is evident that it is exclusively the authorities of the country to which the foreigner or the diplomatic or consular agent in Salvador belongs who decide upon the question of nationality or citizenship. The question once decided by those authorities or agents and either of the documents just mentioned issued in favor of the foreigner, the minister for foreign relations is under the obligation to matriculate him and to give him the corresponding certificate thereof. I do not perceive, therefore, in what sense it can be said that the question of the nationality of foreigners depends upon the decision of the Salvadorian authorities.

“The matriculation has for its object that the Government may be informed of the number of foreign residents in the country and of their respective domicils in order that it may afford them due protection, and to avoid any act being committed against them which might give rise to diplomatic intervention. The foreigner who does not comply with the obligation to matriculate, voluntarily renounces the benefits to be derived therefrom; this in no wise is opposed to the rules of international law nor to the stipulations of treaties. On the other hand, Salvador recognizes and has always recognized the principle that a law can not alter in the least the provisions of treaties, and for the same reason if those with the United States or with any

other friendly nation are opposed to the fulfillment of any of the articles of the law relating to foreigners, such article will not be enforced as regards that nation, and will be applied only to the citizens of the states with which we have no such treaties.

"The first objection in regard to the matriculation of foreigners having been answered, the second objection likewise disappears. Salvador does not nor can not ignore the right of foreign Governments to intervene in behalf of their subjects residing in the Republic; it has done nothing more in the law referred to than to fix a condition upon which foreigners who wish to reside in the country may enjoy the so-called rights of alienage, among which is that of recourse to their respective Governments, as that condition is legitimate and expedient, and depends besides upon the free will of the foreigner. Salvador in establishing it has made use of the natural rights that all peoples of the world have to impose just conditions upon foreigners who wish to reside in their territory. The foreigner who enters Salvador should know that to enjoy certain privileges he is under the obligation to matriculate; if he does not, it is he who tacitly renounces the right to invoke the protection of his government; it is not the government which renounces the right to protect him. . . .

"Notwithstanding the foregoing, my Government will bring your esteemed note to the notice of the national assembly at its next meeting, so that that high body, taking into consideration the observations to which I have had the pleasure to refer, may be pleased to resolve whatever may be expedient."

Señor Delgado, Salvadorian min. of for. aff., to Mr. Hall, Am. min.,  
March 28, 1887, For. Rel. 1887, 113, 114.

In transmitting this communication to his Government, Mr. Hall said:  
"In the meantime I learn that the Government has taken no steps to carry out the law." (For. Rel. 1887, 111.)

"This Government has been constrained to enter earnest protest against a recent decree of the governor-general of Cuba, ordering the registration of all aliens in the island, and pronouncing all those not registered within a certain time as debarred from appealing to the provisions of existing law. The treaty rights of American citizens obviously depend on their actual allegiance to their own Government, not upon any arbitrary inscription as aliens by the state wherein they may be sojourning; and while this Government is well disposed to admit the convenience of the proposed registry as an additional evidence of the right of such citizens in Cuba to the protection of the authorities, and has signified its willingness to facilitate their registration, it can never consent that the omission of a merely local formality can operate to outlaw any persons entitled to its protection as

citizens, or to abrogate the right to the orderly recourses of Spanish law solemnly guaranteed to them by treaty."

Report of Mr. Olney, Sec. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxxvii.

#### XVI. SEAMEN.

##### § 484.

"The general and uniform practice of our consuls to give certificates of citizenship, or protection, to our seamen, may, I think, be very well considered as sanctioned by our Government, by implication, if it has not been done explicitly. The practice is certainly necessary, and is strikingly proper in cases where the consul's interference has procured the release of our impressed seamen; for without such certificates they would be instantly exposed to a repetition of the evil. Besides, multitudes of our seamen have gone abroad without protections, or they have lost them; but still they were not to be abandoned; and who in foreign countries have it in their power so well to ascertain their citizenship as our consuls? The measure was natural and necessary; and hence was practiced by the consuls of other nations as well as our own."

Mr. Pickering, Sec. of State, to Mr. King, min. to England, Oct. 26, 1796, MS. Inst. U. States Ministers, III. 280.

"The circumstance that the vessel is American is evidence that the seamen on board are such," and "in every regularly documented merchant vessel the crew will find their protection in the flag that covers them."

Consular Regulations of the United States of 1888, arts. 171, 172, cited in Mr. Lee, consul-general at Havana, to Mr. Rockhill, Assist. Sec. of State, Oct. 21, 1896, For. Rel. 1896, 740, in relation to one of the prisoners of the American schooner *Competitor*. See *supra*, § 317.

Certain claims were made against the Mexican Government, growing out of the seizure of an American vessel and the imprisonment of the persons on board. The claims were presented by the Government of the United States, and were afterwards referred to an international commission. In one of the claims, made in behalf of a member of the crew, proof of whose American citizenship was lacking, the umpire held that the claim should be allowed, because (1) service on an American vessel was some proof of American citizenship, and (2) "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve."

Sir Edward Thornton, umpire, United States and Mexican Claims Commission, convention of July 4, 1868, Moore, Int. Arbitrations, III. 2536-2537.

"The question of the care and relief of destitute seamen is one in which this Government has from the earliest years of its history evinced the liveliest interest. As early as 1792 Congress provided by law for such relief to American seamen found destitute in foreign ports, and again in the years 1803, 1840, 1856 and 1872, respectively, acts of Congress were passed in relation to the same subject. These several laws enacted by the legislature have received the most liberal interpretation by the executive and judicial branches of the Government, and the relief thus provided is now extended to all American seamen found destitute in foreign countries, regardless of the nationality of the vessel upon which they may have last served; and to all seamen, of whatever nationality, who are found thus destitute, immediately after having served on an American vessel."

Mr. F. W. Seward, Act. Sec. of State, to Chev. Tavera, Austro-Hungarian min., Aug. 13, 1877, MS. Notes to Austria, VIII, 155

See, to the same effect, Mr. Hill, Act. Sec. of State, to Mr. Choate, amb. to England, No. 639, May 24, 1901, MS. Inst. Gr. Br. XXXIII. 612.

A Swede, serving as a seaman on an American vessel, was arrested at Port au Prince on a charge of murdering a Haytian policeman in a drinking house. As it was stated that he had gone ashore without leave, he might, said the Department of State, "be reclaimed as a deserter, but this right is subordinated to any claim which the justice of Hayti may have upon him for violation of the laws of Hayti. If so accused, he has no exceptional right as an American seaman. . . . Were he an American citizen, he would be entitled to all the rights and guarantees of procedure due to any American citizen under treaty stipulations. Being a Swede, his interests in respect of nationality are under the care of the proper representative of his country, to whom, as a matter of courtesy, you may, without objection, communicate the view above stated."

Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, July 31, 1885, MS. Inst. Hayti, II. 511.

In 1891, shortly after the attack on the sailors of the U. S. S. *Baltimore* at Valparaiso, Chile, two British subjects named Patrick Shields and Andrew McKinstry, who were serving as firemen on board the American merchant steamer *Keweenaw*, claimed to have been maltreated on shore by the police of Valparaiso, while the steamer was lying in that port. It was alleged that the reason for their maltreatment was that they were supposed to be American citizens. Claims for their alleged maltreatment were presented to the mixed commission under the convention between the United States and Chile of August 7, 1892. The commission rejected the claims, on the ground that the claimants were British subjects, its jurisdiction being limited to claims of citizens of the United States and citizens

of Chile. Subsequently, the cases became the subject of conference between the Secretary of State of the United States and the Chilean minister at Washington. It was agreed, after an examination of the cases, that the claim of McKinstry was unfounded. It appeared, besides, that Shields had died in 1895, that he had never been naturalized in the United States, and that his heirs were English. In a memorandum communicated to the Department of State by the Chilean minister it is stated that the Secretary of State had intimated that, under these circumstances, the United States had no direct interest in the matter, but wished, at the instance of the British Government, to cooperate in finding a satisfactory solution for the interested parties. May 24, 1897, a protocol was signed by the Secretary of State and the Chilean minister, by which it was agreed that the Chilean Government should pay to the former the sum of \$3,500 on "equitable considerations," such payment to constitute a complete and final settlement of the claim.

For. Rel. 1891, 217 et seq.; For. Rel. 1900, 66-71; Moore, Int. Arbitrations, II. 1478.

"I have to acknowledge the receipt of your dispatch No. 44, of the 25th ultimo, relative to the subject of Chinese sailors enlisted on American merchantmen. You state that the customs authorities of Hawaii have exacted of the captains of American vessels a fee or fine of \$25 for each Chinese coming there as a seaman in the service of the ship, claiming that it was for watching him while there; but that on your request the authorities have decided to refund the money so exacted, and to discontinue the imposition of such a fee in the future. You suggest a fear, however, that in case the captain of an American vessel should desire to discharge a Chinese sailor in Hawaii the authorities may require the captain to give a bond that the discharged sailor shall only work on rice or sugar plantations, or that the vessel will return him to the country whence he came; and you ask my instructions in the premises.

"In the late case of *In re Ross* (140 U. S. 472) decided by the Supreme Court May 25, 1891, Mr. Justice Field, having under consideration the status of an alien enlisted on an American ship, said:

"By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefit of all the laws passed by Congress on behalf of American seamen and subject to all their obligations and liabilities. . . . He could then insist upon treatment as an American seaman and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance.

"So long as a Chinese remains an American seaman he is entitled to the same protecting care of the authorities of the United States as other American sailors. Our law recognizes the changed status of a Chinese while a sailor, and it has been held that a Chinese seaman coming into the ports of this country is not inhibited by the Chinese exclusion acts from temporarily landing on shore without any attempt to remain. (In re Moncan, 14 Fed. Rep. 44; In re Ah Kee, 22 Fed. Rep. 519.) But if such a person should not depart with his vessel or with some other vessel in the ordinary pursuit of his vocation upon the high seas, his presence in the country would become unlawful. And so, without respect to his status, so long as he remains a sailor a vessel could not be permitted to discharge a Chinese in one of our ports and leave him in this country in violation of our laws prohibiting the importation of Chinese laborers.

"On the 25th of November last the British minister complained to this Government that the authorities of the port of Baltimore had warned the captain of the British ship *Oxford*, lately arrived at that port manned by a Chinese crew, that any member of the crew who landed would under existing law be liable to arrest. The matter was called to the attention of the Treasury Department, which, on the 2d day of December, replied that it would 'instruct the collector of the port that as the Chinamen are seamen their temporary landing for the purposes of the vessel, without any attempt to remain in the United States, may be permitted, but that care is to be taken that they depart from the United States in the ship.'

"The present law of this country excludes Chinese laborers, and its execution requires reasonable regulations. We can not deny the same right to any other government. The proper distinction is whether such regulations are a reasonable incident of such laws. The imposition of a fine or fee under the circumstances and for the purposes indicated in your dispatch does not seem to have been such a regulation, and I therefore learn with pleasure that it is proposed to discontinue it. This Government, however, can not object to a regulation prohibiting or regulating the discharge of Chinese sailors in Hawaii which is general in its application and is warranted by the laws of that kingdom."

Mr. Blaine, Sec. of State, to Mr. Stevens, min. to Hawaii, Feb. 25, 1892,  
For. Rel. 1892, 343.

In December, 1893, some seamen belonging to the American schooner *Henry Crosby* were fired upon, under the impression that they were escaping criminals, by soldiers of the Dominican Republic. When the firing took place, the seamen were proceeding to the schooner in a yawl. Two of them were wounded, and as to one of these the Department of State said: "If Smith were an American citizen I

should say that he was entitled to the intervention of this Department to secure an indemnity for his injuries. He is not, however, an American citizen, nor does he come within that statute which provides that a foreigner serving as a seaman on an American vessel shall be entitled to American protection, if he has declared his intention to become a citizen; for it does not appear that he ever made such a declaration."

Mr. Uhl, Act. Sec. of State, to Messrs. Goodrich et al., April 10, 1894, For. Rel. 1895, I. 229, 231.

This position was reaffirmed in a letter of Mr. Uhl, Act. Sec. of State, to Mr. Fischer, M. C., Dec. 6, 1895, For. Rel. 1895, I. 233, 234.

Seamen born in the Philippine Islands are not citizens of the United States within the meaning of any statute concerning seamen or any other statute of the United States.

Griggs, At. Gen., Feb. 19, 1901, 23 Op., 400.

"I have received your No. 511, of the 16th ultimo. You therein inquire, with reference to the application of Joseph **Case of seaman's** or John Ratcliffe to have his wife registered at the **wife.** consulate-general at Kanagawa, whether protection shall be granted in Japan to Japanese wives of seamen, not American citizens, serving on American vessels. The case as presented in your dispatch has had the Department's consideration.

"The first question that arises is whether a British subject who has served seven years on an American national vessel, but who is not shown to have taken any steps toward naturalization, is to be regarded as an American seaman, and as such entitled to protection by the United States consular and diplomatic officers in the East. Section No. 170 of the consular regulations for 1888 goes far to settle this question. It provides that the term 'American seamen' shall be held to include—

"(1) Seamen, being citizens of the United States, regularly shipped in an American vessel, whether in a port of the United States or in a foreign port;

"(2) Foreigners regularly shipped in an American vessel in a port of the United States;

"(3) Seamen, being foreigners by birth, regularly shipped in an American vessel, whether in a port of the United States or a foreign port, who have declared their intention to become citizens of the United States and have served three years thereafter on an American merchant vessel."

"It would seem from this that a foreigner, to come under this section, must have been regularly shipped in a port of the United States (as to which in the present case there is no evidence before the



Department), or have declared his intention of citizenship; and even in such cases the citizenship so imputed is defined as 'within the meaning of the laws relating to the discharge, relief, wages, and extra wages of seamen.'

"It is true that in the case of John Ross (with which your legation is familiar), a British subject, serving on an American vessel, who, while on such vessel in the harbor of Yokohama, committed a crime, was held by the Department to be subject to consular jurisdiction at Yokohama; but between consular jurisdiction over an offense committed by a person while serving on an American ship and consular jurisdiction over such a person as a permanent landsman the distinction is great. The first relates to the flag and its incidents; the second relates to a person on shore as permanently detached from the flag. The United States can sustain jurisdiction in the first case on the ground that the flag imparts nationality. They can not sustain jurisdiction in the second case, because, except in cases in Mohammedan countries of protected foreigners, which exception is rigidly marked, the only way, outside of the flag, of obtaining national protection is by naturalization. In the present case it is not alleged that Ratcliffe has even attempted to obtain naturalization.

"It is not necessary to discuss the question whether Ratcliffe's marriage at Hongkong in 1887 is, on the principles determined by the Department in this relation, to be regarded as valid in international law. Assuming its validity, the Department is clearly of opinion that the woman claiming on this marriage to be his wife is not entitled, as such, to the protection now claimed, even supposing he is entitled to such protection. Ratcliffe's only claim to protection would be his distinctive character as a seaman; and his wife can not be held to take this character for the purpose of protection any more than she could take it for the purpose of navigation."

Mr. Bayard, Sec. of State, to Mr. Hubbard, mln. to Japan, Nov. 10, 1888,  
For. Rel. 1888, II. 1079-1080.

## XVII. CORPORATIONS.

### § 485.

See *infra*, §§ 984, 985.

Corporations, under the treaties between the United States and Great Britain of 1783 and 1794, are entitled, in respect of security for their property, to the same rights as natural persons.

Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464.

The treaty of Guadalupe Hidalgo between the United States and Mexico makes no distinction, in the protection it provides, between

the property of individuals and the property held by towns under the Mexican Government.

*Townsend v. Greeley*, 5 Wall. 326.

The rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be a suit by or against citizens of the State creating the corporation, does not apply to a limited partnership association organized under the Pennsylvania statute of June 2, 1874, entitled "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association except under certain circumstances."

*Great Southern Fire Proof Hotel Co. v. Jones* (1900), 177 U. S. 449.

"There is an indisputable legal presumption that a State corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the State which created it. . . . That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

*St. Louis & San Francisco Railway Co. v. James* (1896), 161 U. S. 545, 562-563.

The rule that the stockholders of a corporation are, for purposes of Federal jurisdiction, conclusively presumed to be citizens of the State under whose laws the corporation was created, was questioned or opposed to *Strawbridge v. Curtiss*, 3 Cranch, 267; *Bank of the United States v. Deveaux*, 5 Cranch, 84; *Commercial and Railroad Bank of Vicksburg v. Slocomb*, 14 Pet. 60. See, also, *Hope Ins. Co. v. Boardman*, 5 Cranch, 57. These cases were reviewed and controlled in 1844 in the case of *Louisville Railroad Co. v. Letson*, 2 How. 497.

See, also, *Muller v. Dows*, 94 U. S. 444; *National Steamship Co. v. Dryer*, 1 Sup. C. R. 58; *Ferry v. Imperial Fire Ins. Co.*, 9 West. Jur. 551.

A corporation under the laws of the State of Minnesota brought suit against the United States in the Court of Claims, under the act of March 3, 1891, 26 Stat. 851, in relation to the payment of Indian depredation claims, for the value of certain horses and harness taken or destroyed by Sioux Indians. The act authorized the payment only of "claims for property of citizens of the United States." The

Court of Claims found as a conclusion of law that the claimant, as a Minnesota corporation, must be presumed to be a citizen of the United States for the purposes of the action. The United States appealed. The decision of the Court of Claims was affirmed.

United States v. Northwestern Express Co. (1897), 164 U. S. 686.

Mr. Justice White, delivering the opinion of the court, observed that Congress had frequently in its legislation, as also had the treaty-making power, used the words "citizens of the United States" as embracing corporations created under State laws. This was the case in Revised Statutes, secs. 2319 and 2321, relating to the purchase of mineral deposits in public lands, and also under the French Spoliations Act of January 20, 1885, 22 Stat. 283. In these cases Congress had entered upon no inquiry as to whether the stockholders were composed in whole or in part of any but citizens of the United States. So, in various treaties of the United States, the phrase "citizens of the United States" had been used as including corporations, companies, and private individuals. By the act of March 3, 1891, the United States had designed to pay for injuries committed by the Indians, its wards. In order to make such restitution the word "citizens" would require a construction embracing Federal and State corporations, since redress must be denied unless the corporation holding legal title to property might bring a claim for damages, the stockholders being legally incompetent to present such a claim. It had been argued that, if corporations were embraced in the terms of the act, an alien who was a corporator might be benefited. But the argument of inconvenience on this ground was overwhelmed by the preponderance of inconvenience on the other side, for, while the alien corporator might be an exception, the corporator who was a citizen both of the State and of the United States was the rule.

Henry Chauncey, a citizen of the United States, and two other persons, also such citizens, made a claim against the Chilean Government as surviving members of the firm of Allsop & Co. The claim was based on alleged interference by the Chilean Government with certain property or property rights, which were transferred in 1875 to that firm, and which, the firm having gone into liquidation, were embraced in a contract of settlement in 1876 between the liquidating partner of the firm and the Government of Bolivia. Subsequently, on the death of the partner in question, Mr. Chauncey became the liquidator of the firm, and as such liquidator he appeared as the firm's representative in presenting the claim. It appeared that the firm was formed in 1870 under the laws of Chile, with its domicil at Valparaiso, and that it constituted under those laws a society of partnership *en comandité*, which constitutes under the law of Chile, which is based on the civil law, a juridical person or entity distinct from its individual members. On this ground it was held that the firm was to be considered for international purposes as a citizen of Chile, and was therefore incapable of prosecuting through its representative

a claim against Chile as a citizen of the United States before an international commission.

Henry Chauncey *v.* Chile, No. 3, United States and Chilean Claims Commission (1901), citing Code of Chile, tit. 28, art. 2053; Calvo, *Droit International*, II. 227, 399; Smith *v.* McMicken, 3 La. Ann. 322; Liverpool Nav. Co. *v.* Agar, 14 Fed. Rep. 615; Wharton's Int. Law Dig. II. 528; Field's Int. Code, art. 545; Müller *v.* Dows, 94 U. S. 445; Code of Belgium, art. 3; Lyon-Caen and Renault, *Droit Commercial*, II. 241-243; the Cerruti Case, as presented in the Italian Green Book, March 13, 1900, and in Calvo, *Droit International*, III. 426.

A British railway corporation, considering itself aggrieved by the action of the British colonial authorities, addressed a memorial to the British Government. The Government of the United States was requested, in behalf of an American corporation, which was said to own all the shares of the British corporation, to support the latter's memorial. The United States answered that the railway company, in whose name the memorial was presented, being a British corporation, could not call upon the United States to intervene in its behalf with the British authorities, but that there was "a more substantial reason for the refusal than that of the distinction between a corporation and its shareholders. It is an established principle that where a State creates a corporation and confers upon it franchises and obligations of an important public character, such as the operating a railroad, the company entrusted with these privileges and duties is not allowed, without the consent of the Government from which it derives its existence, to transfer them to others. This general principle may be to some extent evaded in the case of an incorporated company by a transfer, not of the property itself, but of the shares of stock in the corporation. But the mere transfer of shares between individuals does not affect the complete subjection of the corporation itself to the Government which created it. That Government still retains all the powers of regulation and legislation in respect to the corporation, its rights, privileges and franchises, which it would have had, had there been no transfer of shares. Any attempt at intervention by the Government of persons holding a portion or even the whole of the shares of a corporation, with the Government which created it and within whose limits its operations are conducted, would be an infringement of the principle above referred to."

Mr. Uhl, Act. Sec. of State, to Mr. Wesson, April 29, 1895, 201 MS. Dom. Let. 696.

See Canada Southern Railway *v.* Gebhard (1883), 109 U. S. 527.

A corporation organized in Great Britain, having its principal place of business in that country, is not a subject of that country, within the meaning of a treaty giving subjects of that country the

right to do business in any of the States of the United States on the same terms as natives.

Scottish Union & National Ins. Co. of Edinburgh, Scotland, and London, England v. Herriott, 109 Iowa, 606, 80 N. W. 665.

The Board of Harbor Works of Ponce, Porto Rico, a Spanish corporation, became "as between the United States and other governments, an American citizen," by virtue of the treaty of peace, by which Porto Rico was annexed to the United States.

Mr. Hay, Sec. of State, to Sec. of War, March 27, 1900, 244 MS. Dom. Let. 41.

#### XVIII. CARE OF INDIGENT CITIZENS.

##### § 486.

"There is no appropriation or authority for the relief by a diplomatic representative of a distressed citizen of the United States or for furnishing him transportation home. The exception in the case of seamen falls under consular administration."

Instructions to the Diplomatic Officers of the United States, 1897, § 175, p. 68.

See, to the same effect, Mr. Marcy, Sec. of State, to Mr. Jackson, chargé d'affaires at Vienna, Jan. 31, 1854, H. Ex. Doc. 100, 33 Cong. 1 sess. 31.

While the Federal and State Governments in this country make provision for the care of all destitute, sick, or infirm persons within their borders, without regard to nationality, no provision as yet exists in most States, or under the Federal system, for the relief of destitute, sick, or infirm citizens of the United States abroad.

Mr. Seward, Sec. of State, to Mr. Motley, min. to Austria, April 7, 1863, MS. Inst. Aust. I. 184.

See, to the same effect, Mr. Seward, Sec. of State, to Mr. Fogg, July 28, 1864, MS. Inst. Switzerland, I. 146; Mr. Fish, Sec. of State, to Mr. Delfosse, Dec. 22, 1869, MS. notes to Belgium, VI. 244; Mr. Evarts, Sec. of State, to Mr. Fish, March 5, 1880, MS. Inst. Switzerland, II. 37.

The Russian legation stated, in a note of April 12, 1872, that the Imperial Government had issued a decree providing for the return to their own country of the Russian indigent and sick abroad.

Mr. Fish, Sec. of State, to Mr. Schirkoff, April 22, 1872, MS. Notes to Russ. Leg. VII. 67.

"Congress, from the beginning of the Government, has wisely made provision for the relief of distressed seamen in foreign countries. No similar provision, however, has hitherto been made for the relief of citizens in distress abroad, other than seamen. It is under-

stood to be customary with other governments to authorize consuls to extend such relief to their citizens or subjects in ~~such~~ in cases. A similar authority, and an appropriation to carry it into effect, are recommended in the case of citizens of the United States destitute or sick under such circumstances."

President Grant, annual message, Dec. 2, 1873, Richardson's Messages, VII. 191.

"Instances of insanity on the part of citizens of the United States abroad have, from time to time, been reported to this Department, by ministers and consuls. When their friends here were known, they were apprised of the case, that they might relieve the sufferer. When, however, we could obtain no information as to those friends, or these were unable to provide relief, the case has been reported to the governor of the State of which the patient might be a citizen, so that proper relief might be afforded."

Mr. Evarts, Sec. of State, to Mr. Shishkin, Jan. 8, 1879, MS. Notes to Russia, VII. 255.

Article III. of the treaty of amity and commerce between the United States and Switzerland of 1850 provides that citizens of the one republic residing in the other, who shall desire to return to their own country or who shall be legally sent thither by a judicial decision or act of police, "shall be received at all times and under all circumstances . . . in the country to which they belong, and in which they shall have preserved their rights in conformity with the laws thereof." In the case of Spitznagel in 1861, and Zweifel in 1864, the Swiss Government took the ground that this article did not require either contracting party to provide for the return to its territory of its indigent citizens, but only to receive them when sent back to their own country. The United States coincided with this view, but took the ground that, although neither party might be required to provide for the return of its pauper citizens, it might at least be asked to prevent the exportation of its pauper citizens to the other country.

Mr. Evarts, Sec. of State, to Mr. Fish, No. 139, March 5, 1880, MS. Inst. Switzerland, II. 37.

See, also, Mr. Day, Sec. of State, to Mr. Ploda, Swiss min., No. 173, June 25, 1898, MS. Notes to Swiss Leg. I. 500, to the effect that the article does not require either government to provide for the wants of its indigent citizens residing within the jurisdiction of the other, or to provide the means for their return.

"While it may not be anticipated that judicial proceedings against aliens in British jurisdiction will be conducted otherwise than in strict conformity to law, and with every constitutional guarantee for the fair trial and defense of the accused, yet it is the clear right and

duty of this Government, and, indeed, of any Government, to satisfy itself that its citizens enjoy, whilst temporarily in foreign lands, every right and privilege before the bar of justice, and to see that they are allowed the fullest means of defense. If, therefore, you should find that any citizen of the United States, accused within British jurisdiction of the commission of crime, should, by reason of poverty or friendlessness, or any other cause, not be in enjoyment of all the means of defense which the law assures to him, it is expected that all will be done to aid him which can be done by the representatives of the United States. No expense, however, can be incurred for counsel or otherwise without the authorization of the Department, which in an urgent case may be sought by telegraph."

Mr. Bayard, Sec. of State, to Mr. Lowell, min. to England, Apr. 10, 1885, MS. Inst. Gr. Brit. XXVII. 446.

"The system of public charities in the United States is dependent upon the administrative authority of the respective States and Territories, and the National Government has no jurisdiction over such institutions. Moreover, there is no Federal fund whatever from which the cost of medical treatment or transportation from Europe of an insane pauper could be paid or ever has been paid.

"On the other hand, the patients found in the almshouses and asylums throughout the United States comprise large numbers of persons of foreign birth and nationality, who are not for that reason sent out of the country, but are cared for by the authorities of the locality in which their illness happens to occur."

Mr. Bayard, Sec. of State, to Count Lippe-Weissenfeld, Aust. chargé, June 8, 1886, MS. Notes to Austria, VIII. 518.

With regard to an American citizen, a circus performer, who was confined in a lunatic asylum at Lisbon, Mr. Bayard stated that any remittance that his friends desired to send to pay his debts, or to provide for his transportation home, should be drawn payable to the consul-general's order, but that it was impossible to bring him home on a training ship, as suggested by the consul-general.

Mr. Bayard, Sec. of State, to Mr. Campbell, Aug. 5, 1886, 161 MS. Dom. Let. 159.

"Applications have frequently been made to this Department by State and municipal authorities in various parts of the country to obtain the return to their native lands of foreigners who, through disease or misfortune, had become a public charge on the community, but the reply has invariably been made that, as this Government has no funds at its disposal for bringing back to this country an American citizen who had become a public charge abroad, and had thus been

compelled to decline such requests when made by foreign governments, it could not ask a foreign government to assume this expense in the case of one of its subjects or citizens who had become a public charge in the United States."

Mr. Wharton, Act. Sec. of State, to Mr. Douglas, Nov. 28, 1891, 184 MS. Dom. Let. 247.

In February, 1896, a discussion took place between the United States and Germany as to one Jacob Franck, a seaman on a German steamer, who had been discharged from that vessel or had deserted from it in December, 1895, at Savannah, Georgia, and had become a public charge by reason of insanity. The German ambassador stated that no provision for his return was made by the Imperial laws. It seems there was a question as to his citizenship. By the laws and regulations of the United States, provision is made for the relief of destitute or disabled American seamen in foreign lands by the consular representatives of the United States where such seamen are found to be citizens of the United States, even though they may have deserted.

The case was brought to the attention of the Secretary of the Treasury, who held that Franck was not an alien immigrant and could not be returned to Germany under the immigration laws, it being impossible to eliminate from the case his character as a deserting seaman. In this relation the attention of the German ambassador was called to article 14 of the treaty between the United States and the German Empire of December 11, 1871, in relation to the delivery of deserters, and it was suggested that although the article was permissive in form, it was framed on the assumption that each contracting party would recover its deserters and not permit them to become a charge upon a foreign community, and that the execution of it in such a case was "an international obligation of comity as well as a duty of humanity to the sufferer." The German ambassador subsequently stated that the Imperial Government was unable to regard the article in question as imposing any obligation on German consuls to take charge of seamen who were deserters. He also stated that three years previously the United States legation at Berlin "expressly informed the foreign office that it declined, on principle, to send home at the expense of the United States destitute Americans who were in German insane asylums."

For. Rel. 1896, 199-205.

"The Federal Government is without authority of law or appropriated funds to bring such [insane] persons back, even at the instance of their relatives; but, on the other hand, it makes no demand upon other governments to remove foreign lunatics who have been



admitted to State or district asylums, confining itself in exceptional cases to giving information through the diplomatic channel, in order that the relatives may have the opportunity to care for the individual."

Mr. Olney, Sec. of State, to Mr. Hengelmüller, Austrian min., Jan. 13, 1897, For. Rel. 1897, 13-14.

Mr. Hengelmüller, in a note to Mr. Sherman, Secretary of State, May 19, 1897, stated that in all cases where American citizens had become insane in Austria they had been removed to the public asylums where they had been treated and cared for, and that application for compensation or for the removal of such persons to their homes had not been made until sometime afterwards, and then through the diplomatic channel. The United States, said Mr. Hengelmüller, had referred to the fact that when the case was reversed and insane foreigners were admitted into American State or district asylums the United States presented no claim for indemnity to their governments. In this relation, Mr. Hengelmüller brought to the notice of the Department of State the case of an insane person, said to be an Austrian subject, who was confined in a jail in Virginia as a lunatic, and stated that his being confined in jail instead of being taken to an insane asylum was not in harmony with the principles of humanity or with the course pursued towards American citizens who had become insane in Austria-Hungary. (For. Rel. 1897, 14.)

Nov. 16, 1896, Mr. Hengelmüller renewed a request that Amalie or Amalla Roeber, an insane inmate of the general hospital at Vienna, be brought back to the United States. It appeared that she came to the United States with an aunt when nine years old; that in Sept., 1867, she married Emil Roeber, who in the following month, became a citizen of the United States; and that she obtained a passport from the American legation in Vienna in 1888. It did not appear when she went to Europe, nor where she last previously resided, though it was stated that she had lived partly in New York and partly in Boston. But, said the Department of State, waiving the question whether before she became insane she intended to return to the United States, "it would necessarily have to be determined of what State she was a resident before the authorities thereof would be justified, if at all, in receiving her. If this cannot be definitely shown, it naturally follows that neither the State of New York nor that of Massachusetts can be rightfully expected to assume such a charge. There is no Federal law or appropriation, moreover, under which an insane citizen of the United States can be returned from Europe to this country. If, therefore, the friends or relatives of the person in question cannot be found, or will not have her removed, the Department perceives no way in the present status of the case by which a compliance with the request of your Government can be effected." (Mr. Olney, Sec. of State, to Mr. Hengelmüller, Jan. 9, 1897, For. Rel. 1897, 11, 12; MS. Notes to Aust. Leg. IX. 292.)

A similar request was made by Mr. Hengelmüller, Nov. 4, 1896, in the case of Albert Levy, also an insane inmate of the general hospital at Vienna. It appeared that he was naturalized at San Francisco in 1887, and that he had an American passport which was issued in 1896. The request was referred to the governor of California, who

answered that the police authorities of San Francisco were unable to obtain any information concerning Levy except that he was thought to be of unsound mind when he lived there; that he apparently had no relatives in the United States; and that he was understood to have had an Austrian wife who did not accompany him to America. The governor also said that the State of California could take no action in the matter; that it cared for all dependent afflicted inhabitants, but had no law to authorize the sending abroad for persons who would be a proper charge on the State if they resided within its jurisdiction. (Mr. Sherman, Sec. of State, to Mr. Hengelmüller, June 18, 1897, For. Rel. 1897, 15.)

Feb. 15, 1889, Congress passed a bill appropriating \$250,000 to enable the President to protect the interests of the United States and to provide for the security of persons and property of citizens of the United States on the Isthmus of Panama, in such manner as he might deem expedient. The immediate occasion of this appropriation was the stoppage of work on the proposed interoceanic canal, by reason of the failure of the French company, whereby from 12,000 to 15,000 men were thrown out of employment, a third of whom were said to be American citizens. The Colombian Government, apprehensive lest the presence of a large number of unemployed and destitute men on the Isthmus might give rise to grave disorders, appealed to foreign governments to take away their destitute citizens. This appeal was laid before Congress, with special reference to the stipulations of Art. 35 of the treaty of 1846, with regard to the transit. By an executive order of February 26, 1889, issued in execution of the act in question, the President directed the transportation to their homes of American citizens who were destitute in the Department of Panama. The act and the order were construed as warranting the furnishing, where necessary, of subsistence to destitute citizens while awaiting a vessel, and indispensable clothing suitable to the climate into which they were going.

Congressional Record, Feb. 15, 1889, 50 Cong. 2 sess., pp. 1936-1938; Mr. Rives, Assist. Sec. of State, to Mr. Adamson, cons. gen. at Panama, No. 186, Feb. 19, 1889, 129 MS. Inst. Consuls, 25; Mr. Adee, Second Assist. Sec. of State, to Mr. Adamson, No. 188, March 16, 1889, id. 235.

"As a sequel to the failure of a scheme for the colonization in Mexico of negroes, mostly emigrants from Alabama under contract, a great number of these helpless and suffering people, starving and smitten with contagious disease, made their way or were assisted to the frontier, where, in wretched plight, they were quarantined by the Texas authorities. Learning of their destitute condition, I directed rations to be temporarily furnished them through the War Department. At the expiration of their quarantine they were conveyed by the railway companies at comparatively nominal rates to their homes

in Alabama, upon my assurance, in the absence of any fund available for the cost of their transportation, that I would recommend to Congress an appropriation for its payment. I now strongly urge upon Congress the propriety of making such an appropriation. It should be remembered that the measures taken were dictated not only by sympathy and humanity, but by a conviction that it was not compatible with the dignity of this Government that so large a body of our dependent citizens should be thrown for relief upon the charity of a neighboring state."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, xxx.

## CHAPTER XI.

### DOMICIL.

- I. A SOURCE OF CIVIL STATUS, § 487.
- II. BELLIGERENT DOMICIL, § 488.
- III. THRASHER'S CASE, § 489.
- IV. THE KOSZTA CASE.
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#### I. A SOURCE OF CIVIL STATUS.

##### § 487.

By a person's domicile is meant, generally speaking, his permanent home. It is the criterion, in English and American law, of civil as distinguished from political status. The case is the same in the law of other countries, though not of all. In Italy, for example, civil status follows the political; and so it does to a great extent in France, and in countries which, like Belgium, have followed the French civil code. It is not, however, conversely true that in countries where civil status is derived from domicile the political status follows the civil. In such countries the two conceptions are distinct, neither being dependent upon the other. In primitive times it was not so. In days when the people were generally attached to the soil, when individuals traveled little and seldom changed their abode, domicile was the general criterion of status, political as well as civil, if, indeed, it can be said that such a distinction then existed. But, with the passing away of the feudal system and the rise of the modern national state, together with the coincident development of commerce and industry, political allegiance—allegiance to the nation—became, as a distinct conception, the test of national character, while domicile, whether national or quasi-national, or merely municipal, remained the test of rights in civil relations.

As the test of civil status, domicile directly affects a person's civil rights and obligations, in respect of personal capacity, legitimacy, intestacy, and various other matters. It may also materially affect the extent of his liabilities, as in matters of taxation; for, while all persons within the jurisdiction of a state owe obedience to its laws, those who live continuously under their protection may, by so doing, reciprocally acquire rights and incur obligations more extensive

than pertain to merely transient persons. These things belong, however, chiefly to the domain of private international law, and are primarily of juridical rather than of political cognizance. In consonance with this principle, it has often been argued that political intervention should be sparingly granted to citizens who complain of the action of the tribunals of a foreign country in which they are domiciled. Sometimes the argument has been carried further; so far, indeed, as to treat the assumption of a foreign domicile as a renunciation not only of the right to intervention, but also of national allegiance—in other words, as an act of complete expatriation. This view is believed to be exceptional, and, unless under peculiar circumstances, scarcely capable of justification on modern principles.

In only one particular is domicile generally admitted to determine national character, and that is in matters of prize, where, the object being to strike at the enemy's resources, all persons settled in the enemy's country are held to be tinctured with his belligerent character, so far as concerns their trade, so that their property may be captured on the high seas as enemy property. This doctrine is known by the title "belligerent" or "commercial" domicile; and its reason and object are further characterized by the circumstance that the courts have not always exacted, as a condition of the status thus described, the same intention of permanent residence as in cases of domicile in the ordinary sense. On the contrary, there has been a tendency to treat persons as having a belligerent domicile because they are found to be in fact *inhabitants* of the enemy's country.

Belligerent domicile, in giving a national character in matters of prize, works no change of allegiance. Not only is there an entire agreement on this point, but it is frequently stipulated by treaty that, if war should break out between the contracting parties, the citizens of each residing in the territories of the other shall be permitted quietly to remain there, paying obedience to the laws. It is obvious that nations do not by such stipulations intend in case of war to release their citizens from their allegiance, much less to transfer it from the one to the other; nor yet to interfere with the usual operation of the law of prize. The complete dissociation of the special national character, derived from belligerent domicile, from the general and paramount national character, derived from political allegiance, is also well exemplified by the ruling of the English and American courts that the property of a person engaged in trade in a belligerent country may be captured as enemy's property, even though such person be a foreign consul.

In *Guier v. O'Daniel* (1806), 1 Binney, 349 n., domicile is defined as "a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." This defini-

tion is substantially adopted by Phillimore.<sup>a</sup> Story defines the term, "in its ordinary acceptation," as "the place where a person lives or has his home;" and, in "a strict and legal sense," as the place "where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning."<sup>b</sup> This definition has been widely accepted by the courts. The phrase, "principal establishment," was and is employed in the civil code of Louisiana. Wharton defines domicile as "a residence acquired as a final abode."<sup>c</sup>

To acquire domicile in a place, there must be (1) residence, and (2) an intention to remain permanently or indefinitely. Where the physical facts as to residence are not disputed, the sole question is that of intention.

See, more fully, as to domicile, Dicey on Domicil; Dicey on the Conflict of Laws, with American Notes by J. B. Moore; and Jacobs' Law of Domicil.

In the American cases a distinction is sometimes made, implicitly as well as explicitly, between domicile with reference to an independent country, and domicile with reference to a political division of a country. The former is called national domicile; the latter, municipal domicile. Jacobs, in his excellent work, also uses the term quasi-national domicile, to indicate "that domicile which has for its seat a quasi-autonomous state, such as the States of this Union, or the various countries and colonies composing the realm of Great Britain."<sup>d</sup>

In discussing quasi-national domicile, however, the courts generally speak of "national domicile." But, in the case of municipal domicile, there is a tendency to give greater weight to mere residence or personal presence, and to recognize more readily a change of domicile, than in the case of national domicile; and to a less extent the same tendency may be observed in respect to quasi-national domicile.

See Dicey's Conflict of Laws, Moore's American Notes, 158.

Where a domicile is established in a particular place, it continues there till a new domicile is acquired.

Price v. Price, 156 Pa. St. 617, 27 Atl. 291; Cooper v. Beers, 143 Ill. 25, 33 N. E., 61; Cobb v. Rice, 130 Mass., 231; Reed's Appeal, 71 Pa. St., 378; Cruger v. Phelps, 47 N. Y. S. 61, 21 Misc., 252.

Kosciusko's "declarations that his residence was in France, in the way they were made in his wills, with an interval of ten years between them, would, upon the authority of adjudged cases, be sufficient to establish, *prima facie*, his domicile in France. Such declara-

<sup>a</sup> Law of Domicil, § xv.; 4 Int. Law, § xlix.

<sup>b</sup> Conflict of Laws, § 41.

<sup>c</sup> Conflict of Laws, § 21.

<sup>d</sup> Law of Domicil, §§ 77, 207, 362.

tions have always been received in evidence, when made previous to the event which gave rise to the suit. They have been received in the courts of France, in the courts of England, and in those of our own country. . . . Kosciusko's domicile of origin was Lithuania, in Poland. The presumption of the law is that it was retained, unless the change is proved, and the burden of proving it is upon him who alleges the change. (*Somerville v. Somerville*, 5 Vesey, 787.) . . . But what amount of proof is necessary to change a domicile of origin into a *prima facie* domicile of choice? It is residence elsewhere, or where a person lives out of the domicile of origin. That repels the presumption of its continuance, and casts upon him who denies the domicile of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicile, until other facts establish the contrary. . . . It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family and pursuits of life. . . . A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown, or inferred from circumstances, that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicile. The result is that the place of residence is *prima facie* the domicile, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place."

*Ennis v. Smith*, 14 How. 422, et seq.

With regard to an act of the Colombian Congress, in 1866, which undertook to define, among other things, "the circumstances which are to afford a presumption of the purpose of a foreigner to become domiciled" in that country, Mr. Seward said: "One of these [circumstances] is marriage with a native and two years continuous residence. The time and circumstances which constitute the legal domicile of a foreigner have usually been a subject of judicial decision, and as such it varies according to the facts of the case. The right of a government to define such domicile by municipal law can not be questioned. Such a right can only be relinquished or modified by treaty. The definition by statute may seem arbitrary; but if a foreigner goes to or stays in a country where it prevails he can not reasonably complain, especially if it should be impartially executed. Of course in

this respect we can not submit to any discrimination against citizens of the United States."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 155, Sept. 27, 1866, MS. Inst. Colombia, XVI. 200.

Citizens of the United States residing in countries where they enjoy extraterritoriality, thus living more or less under the protection of their own government and being answerable to its laws, "are generally held to retain their American domicil."

Mr. Rives, Assist. Sec. of State, to Mr. Sewall, cons. general at Apla, March 6, 1888, S. Ex. Doc. 31, 50 Cong., 2 sess. 34.

The domicil of a married woman is, as a rule, the same as that of her husband, and changes with it.

*Anderson v. Watt*, 138 U. S. 694; *Howland v. Granger*, 45 Atl. 740.

See *Matter of Florance*, 54 Hun (N. Y.) 328. But a wife may, after judicial separation from her husband, choose a domicil for herself (*Barber v. Barber*, 21 How. 582; *Hunt v. Hunt*, 72 N. Y. 217); or may gain an independent domicil after being abandoned by her husband. (*Greene v. Windham*, 13 Me. 225; *Shute v. Sargent*, 36 Atl. 282.)

A wife can not create a claim to an independent domicil by abandoning, without cause, the domicil of her husband, but may otherwise acquire a separate domicil for divorce purposes. (*Harteau v. Harteau*, 14 Pick. 181; *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806; *Mellen v. Mellen*, 10 Abb. (N. Y.) N. C. 329, and note, pp. 333-342, reviewing the decisions.)

The domicil of a widow is presumed to be that of her deceased husband, unless she has exercised the right to change it.

*Pennsylvania v. Ravenel*, 21 How. 103.

The domicil of a minor is the same as, and changes with, that of the father.

*Lamar v. Micou*, 112 U. S. 452; *Allgood v. Williams*, 92 Ala. 551, 8 So. 722. See *In re Vance*, 92 Cal. 195, 28 Pac. 229.

The domicil of a minor whose father is dead is the same as, and changes with, the domicil of the mother, so long as she remains a widow.

*Kennedy v. Ryall*, 67 N. Y. 379.

It is not changed by her marrying again and acquiring the domicil of another husband. (*Lamar v. Micou*, 112 U. S. 452.)

See *Marks v. Marks*, 75 Fed. Rep. 321.

As to the power of a guardian to change the domicil of his ward, the following propositions have been laid down:

"A testamentary guardian nominated by the father may have the same control of the ward's domicil that the father had . . . And



any guardian, appointed in the State of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same State and under the same law. . . . But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined . . . And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing can not change the ward's permanent domicile from one State to another."

Lamar v. Micou, 112 U. S. 452, 471, 472.

See Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857; In re Henning's Estate, 128 Cal. 214; Peacock v. Collins, 110 Ga. 281.

## II. BELLIGERENT DOMICIL.

### § 488.

"A person found residing in a foreign country is presumed to be there *animo manendi*, or with the purpose of remaining; and to relieve himself of the character which this presumption fixes upon him, he must show that his residence was only temporary, and accompanied all the while with a fixed and definite intention of returning. If in that country he engages in trade and business, he is considered by the law of nations as a merchant of that country; nor is the presumption rebutted by the residence of his wife and family in the country from which he came. This is the doctrine as laid down by the United States courts. And it has been decided that a Spanish merchant, who came to the United States and continued to reside here and carry on trade after the breaking out of war between Spain and Great Britain, is to be considered an American merchant, although the trade could be lawfully carried on by a Spanish subject only."

Report of Mr. Webster, Sec. of State, to the President, in Thrasher's case, Dec. 23, 1851, 6 Webster's Works, 521, 524; S. Ex. Doc. 5, 32 Cong. 1 sess.; II. Ex. Docs. 10, 14, 32 Cong. 1 sess.

See Lawrence's Wheaton (1863), 176; Lawrence's Com. sur droit. int. III. 138; Moore, Int. Arbitrations, III. 2701-2703.

See, further, *supra*, § 468; *infra*, § 489.

"The highest judicial tribunals of this country, as well as those of the principal powers of Europe, have deliberately decided, after elaborate argument, that merchants domiciled and carrying on business in a country at war with another must be regarded as enemies. This rule has even been applied [by the courts of the United States]

to citizens of the United States engaged in commerce in an enemy's country."

Mr. Marcy, Sec. of State, to Baron Gerolt, Prussian min., Feb. 15, 1854,  
MS. Notes to Prussian Leg. VII. 10.

### III. THRASHER'S CASE.

#### § 489.

Two cases have been cited as the ground of intimations now and then made that domicile may or should, even apart from matters of prize, to some extent, not definitely expressed, supplement, and indeed supplant, allegiance as the test of national character, and thus serve as the basis of diplomatic intervention. One of these cases is that of John S. Thrasher, the other that of Martin Koszta. In regard to both, grave misapprehensions have at times prevailed. These misapprehensions, in Thrasher's case, have been due not only to the fact that Mr. Webster's famous report of December 23, 1851, written in response to a resolution of Congress and embodying a hypothetical opinion, was immediately published, while a later paper, in which, upon fuller information, he reached a different conclusion, remained for many years unknown, but also to the failure to observe either the exact purport of Mr. Webster's reasoning or the circumstance that, when he spoke of domiciliation, he referred to something which, although it did not necessarily presuppose the existence of domicile, went in some respects beyond it. In Koszta's case the misapprehensions seem in great part to have been due to a want of familiarity with the circumstances of the transaction, as well as with the text of Mr. Marcy's celebrated paper, except, perhaps, as it may be found in extracts which, when torn from the context, serve chiefly to mislead.

The early published report in Thrasher's case related to the question whether he was entitled to the intervention of the United States, in respect of his arrest, sentence, and imprisonment in Cuba on a charge of complicity in the Lopez expedition of 1850. It appeared that he had taken out letters of domiciliation in Cuba, and there was reason to believe that he was also domiciled in the island. The process of obtaining such letters involved the taking of an oath of allegiance, which it was thought might have had the effect of making him a Spanish subject and dissolving his allegiance to the United States. But, even assuming that this was not the case, Mr. Webster argued that if he was domiciled in Cuba he was, as a permanent resident, peculiarly subject to the operation of the laws there, and could not ask the United States to intervene to prevent the imposition of any penalties which he might justly have incurred by the violation of those laws. In this relation Mr. Webster said:

"The general rule of the public law is, that every person of full age has a right to change his domicile; and it follows, that when he removes to another place, with an intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. The Supreme Court of the United States has decided 'that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside in that country, as to stamp him with its national character;' and this undoubtedly is in full accordance with the sentiments of the most eminent writers, as well as with those of other high judicial tribunals on the subject. No government has carried this general presumption farther than that of the United States, since it is well known that hundreds of thousands of persons are now living in this country who have not been naturalized according to the provisions of law, nor sworn any allegiance to this Government, nor been domiciled amongst us by any regular course of proceedings. What degree of alarm would it not give to this vastly numerous class of men, actually living amongst us as inhabitants of the United States, to learn that, by removing to this country, they have not transferred their allegiance from the governments of which they were originally subjects to this government? And, on the other hand, what would be the condition of this country and its government, if the sovereigns of Europe, from whose dominions they have emigrated, were supposed to have still a right to interpose to protect such inhabitants against the penalties which might be justly incurred by them in consequence of their violation of the laws of the United States? In questions on this subject, the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence. If it sufficiently appear that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicile is acquired by a residence even of a few days."

Again, in the same paper, Mr. Webster said: "No man can carry the ægis of his national American liberty into a foreign country, and expect to hold it up for his exemption from the dominion and authority of the laws and the sovereign power of that country, unless he be authorized to do so by virtue of treaty stipulations."

These passages certainly involve no new doctrine. They merely lay down the familiar and fundamental rule of the supremacy of the territorial jurisdiction, with an accentuated affirmation of its peculiar applicability to permanent dwellers.

As to the other question, Mr. Webster, on fuller information, decided that the taking out of letters of domiciliation did not involve expatriation nor deprive Mr. Thrasher of the right to claim the privileges secured to citizens of the United States by the treaty of 1795.

See, *supra*, § 468; Webster's Works, VI. 521, 523, 528; S. Ex. Doc. 5, 32 Cong. 1 sess.; II. Ex. Docs. 10, 14, 32 Cong. 1 sess.; Mr. Webster, Sec. of State, to Mr. Sharkey, consul at Havana, No. 16, July 5, 1852, 14 MS. Desp. to Consuls, 346; Moore, Int. Arbitrations, III. 2701, where Mr. Webster's instruction to Mr. Sharkey, of July 5, 1852, conveying his final opinion on the question of domiciliation, is given in a summary of the great argument on domicile, by J. Hubley Ashton, esq., before the Mexican Claims Commission under the treaty of July 4, 1868.

"I am directed to inform you that, agreeably to your wishes, the U. S. consul-general in Cuba has been instructed to renew the request heretofore made by his predecessor for copies of certain papers relating to your trial and imprisonment in Cuba by the Spanish authorities." (Mr. Appleton, Assist. Sec. of State, to Mr. Thrasher, Jan. 21, 1859, 50 MS. Dom. Let. 9.)

In 1866 the Colombian Congress undertook by statute to define the rights and duties of aliens. By the second section, it was declared that aliens domiciled, and not merely transient, in the country should "enjoy the same civil rights and guarantees and be subject to the same obligations as to person and property as Colombians." To the general principle thus laid down, Mr. Seward perceived no objection, in view of the right of jurisdiction possessed by states over all persons within their territory, except where such jurisdiction is relinquished, as in the case of Mohammedan countries. The act also provided, however, that domiciled aliens should enjoy the exemptions to which they might be entitled by public treaties; and in this relation Mr. Seward called attention to Art. XIII. of the treaty of 1846, which, although it did not provide for any exemptions from the local law, stipulated that the contracting parties should each extend to the citizens of the other within its territories "special protection," whether they were "transient or dwelling therein." Mr. Seward intimated that this stipulation precluded the Colombian Government from drawing "a distinction between our citizens who are commorant and those who are only transiently in that country."

Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia, No. 155, Sept. 27, 1866, MS. Inst. Colombia, XVI. 200.

Where a British subject, for whose killing by a local officer in New Mexico a diplomatic claim for damages had been made, appeared to have been domiciled in that Territory, it was suggested that as he was not, so far as concerned "the administration of the judicial function there, a foreigner," and as his personal estate, if he died

intestate, would be distributed in accordance with local law, his "representatives" had "no title to the intervention of a foreign sovereign."

Mr. Bayard, Sec. of State, to Mr. West, Brit. mln., June 1, 1885, For. Rel. 1885, 450, 459.

This case is cited in Mr. Porter, Act. Sec. of State, to Mr. Burt, July 11, 1885, 156 MS. Dom. Let. 232.

#### IV. THE KOSZTA CASE.

##### 1. MARCY-HÜLSEMANN CORRESPONDENCE.

#### § 490.

"The undersigned, chargé d'affaires of his Majesty the Emperor of Austria, has been instructed to address this official note to the honorable Secretary of State, in relation to the difficulties which have occurred between the agents of the two Governments at the port of Smyrna.

"The facts which came to pass on that occasion are of public notoriety, and the undersigned thinks he may confine himself in his comments thereon to the most prominent points. Our consul-general, Mr. de Weckbecker, exercising the right of jurisdiction which has been guaranteed by treaties to the consular agents of Austria in the East relative to their countrymen, had caused to be arrested, and conveyed on board the Austrian brig-of-war 'Huszar,' the Hungarian refugee, Martin Koszta; who, residing at one time in the interior at Kutahia, had left Turkey, in company with Kossuth, and who, after having pledged himself in writing not to set foot again on Ottoman territory, broke that pledge by returning some months since to Smyrna. This arrest gave cause to some reclamations which Mr. Offley, United States consul, conjointly with the commander of the American sloop-of-war 'St. Louis,' anchored in the roads before Smyrna, deemed it incumbent upon themselves to address to Mr. de Weckbecker, basing their demands upon the fact that the aforesaid Koszta, having, according to them, caused himself to be naturalized in the United States, was entitled to the protection of the American authorities. Upon this, the consul-general of the Emperor, accompanied by the American consul and the American commander, repaired on board the 'Huszar,' and these two functionaries had it in their power to convince themselves, from the declarations of the prisoner himself, that the latter had not acquired the quality of citizen of the United States, and that he was not even provided with an American passport.

"On his own part, the chargé d'affaires *ad interim* of the United States at Constantinople addressed a communication, on the 27th of June, to the Imperial Internuncio (minister), the object of which was

to ask for the release of Koszta, upon the plea that he had taken some steps to be admitted as an American citizen. Baron de Bruck replied to this request on the same day, refusing to comply with it. Two days after, Mr. Brown returned again to the charge, by forwarding to Mr. de Bruck a copy of a declaration purporting to have been signed by Koszta, in New York, on the 31st day of July last, and which the chargé d'affaires of the Union seems to regard sufficient to imply the naturalization of that refugee in America. . . . Even admitting the authenticity of this declaration, and supposing that Koszta could, without violating the laws of his country of his own accord, and without any other formalities, have broken asunder the ties which bind him to his native soil, the text of the document shows that the author of it has done nothing more than to declare his *intention* of becoming a citizen of the United States, and, with that object in view, of renouncing his rights of nationality in the States of the Emperor.

"A few days later, a new and lamentable episode occurred to aggravate the question. On the morning of the 2d of July, the commander of the American sloop-of-war 'St. Louis,' Mr. Ingraham, sent a message to the commanding officer of the 'Huszar,' to the effect that, in pursuance of instructions received from the chargé d'affaires of the United States at Constantinople, he had to call upon him to deliver the aforesaid Koszta into his hands; adding that if he did not receive a satisfactory answer by 4 o'clock in the afternoon, he should cause the prisoner to be taken away by main force. As it was reasonable to expect, our commander, instead of complying with this request, prepared himself to repulse force by force; and when, at the hour designated, the American commander, getting ready to carry out his threat, ranged himself alongside our vessel and brought his guns to bear upon the Imperial brig, and was about to carry matters to the last extremity, our brave sailors, although much inferior in numbers, were determined to oppose a vigorous resistance to the act of aggression which was on the point of being consummated in the neutral port of Smyrna, and on the part of a vessel of war belonging to a power with which Austria was at peace. Our consul-general only succeeded in preventing this bloody catastrophe, which would probably have ended in the destruction of a considerable portion of the town of Smyrna, and of vessels of all nations in the harbor, by consenting that Koszta should temporarily, and until the settlement of the difficulties of which he was the subject, be confided to the custody of the consul-general of France, at Smyrna. . . .

"In our opinion, Koszta has never ceased to be an Austrian subject. Everything combines to make the Imperial Government persist in this estimate of the matter. The laws of his country are opposed to Koszta's breaking asunder of his own accord, and without

having obtained permission to expatriate himself from the authorities of that country, the ties of nationality which bind him to it. . . . The undersigned thinks he may dispense entering into any further details in regard to this question, seeing that the Department of State of the United States constantly refuses to grant passports to individuals who find themselves in this category, and that official publications have been made from time to time to that effect.

"As there can be no doubt, therefore, concerning the question of nationality, the consul-general of the Emperor at Smyrna was without-doubt perfectly justified, when, in virtue of those treaties, which subject Austrian subjects in Turkey to consular jurisdiction, he seized the person of Koszta within the pale of his jurisdiction.

"Such being the case, the Imperial Government trusts that the Government of the United States will hasten to instruct its consul at Smyrna not to interpose any obstacle to the extradition of the aforesaid Koszta by the consul-general of France to the consul-general of Austria at Smyrna.

"But, apart from this question of jurisdiction, it is especially the mode adopted by the functionaries of the United States, in order to settle the matter, which has given the Imperial Government the most legitimate grounds of complaint.

"The act of violence which the commander of the sloop-of-war 'St. Louis' committed against the Austrian brig 'Huszar'—that real act of war, committed in full peace, in a neutral port, the fatal effects of which were only averted by the prudence and moderation of our consul-general at Smyrna—constitutes an outrage upon the principles of the law of nations; and the Imperial Government has no doubt but that this act, viewed in such light, will have been condemned by the Government of the United States, said Government being itself interested in preventing the repetition of similar occurrences.

"The events of the second of July at Smyrna present in a twofold point of view a serious deviation from the rules of international law.

"1st. The commander of the United States sloop-of-war 'St. Louis' threatened the brig of His Imperial and Royal Apostolic Majesty, the 'Huszar,' with a hostile attack, by bringing his guns to bear upon the latter, and by announcing, in writing, that if a certain individual detained on board, whose nationality was being discussed between the agents of the two Governments, was not delivered over to him at a stated hour, he would go and take him by main force.

"There can be no doubt but that the threat of attacking, by main force, a vessel of war belonging to the military marine of a sovereign state whose flag she carries, is nothing else than a threat of an act of war. Now, the right of making war is necessarily, and from the very nature of that right, inherent in the sovereign power.

“‘A right of so momentous a nature,’ says Vattel (*Law of Nations*, vol. 2, book 3, chap. 1, § 4) ‘the right of judging whether the nation has real grounds of complaint; whether she is *authorized to employ force, and justifiable in taking up arms*; whether prudence will admit of such a step, and whether the welfare of the state requires it—that right, I say, *can belong only to the body of the nation, or to the sovereign, her representative*. It is doubtless one of those rights *without which there can be no salutary government*, and which are therefore called *rights of majesty*.’

“The founders of the Republic of the United States fully recognized, from the beginning of the Union, the rights reserved to the sovereign power. The articles of perpetual confederacy and union between the States of New Hampshire, Massachusetts, &c., of 1778, contain already the following stipulation (IX. § 1):

“‘The right of declaring war and to make peace shall belong solely and exclusively to the Congress of the United States.’

“This basis of the public law of the United States was preserved and sanctioned by the Constitution of the United States of 1787, which reserves the power of declaring war explicitly to Congress (Section VIII.).

“Upon this point the Constitution of the United States harmonizes perfectly with the public law of Europe.

“But this right, reserved to the supreme power of each country, would become illusory and null, if commanders of naval forces or others were to be explicitly or tacitly authorized to undertake, either of their own accord or upon the order or with the consent of a diplomatic or consular agent, to commit acts of aggression and of war against the vessels or the troops of another nation, without special instructions from the supreme authority of their own country, notified in the forms prescribed by the law of nations. . . .

“2dly. This act of hostility has been committed in a neutral port of a power friendly to both nations.

“Certainly, if there be one point of maritime and international law which is clearly and positively defined, and which has been adopted by all the powers of the world, it is the inviolability of neutral ports, the *absolute* prohibition from committing, in such ports, acts of war and of violence, even against the enemy with whom we are at open war. . . .

“The history of maritime wars at the period of the French Revolution furnishes abundant proofs of the very particular jealousy with which the Government of the United States maintained the rights of neutrals; and the undersigned would cite some celebrated cases, in which the first statesmen of the Union, the most distinguished predecessors of Mr. Marcy in the high position which he fills, have defended the absolute inviolability of neutral ports, by means of most elaborate



arguments. But as the undersigned is fully persuaded that the same doctrines will serve as guides to the Government of the United States on the present occasion, he confines himself to this slight allusion to those principles which were formerly maintained, and very recently supported by the Government of the United States in relation to the rights of neutrals, and more especially in regard to the inviolability of neutral ports.

"The Imperial Government entertains too high an opinion of the sense of justice and of integrity of the Government of the United States to doubt for a single instant its anxiety to disavow the conduct of its agents, under the circumstances above mentioned, and that it will hasten to call them to a severe account, and tender to Austria a satisfaction proportionate to the magnitude of the outrage."

Mr. Hülsemann, Austrian chargé d'affaires, to Mr. Marcy, Sec. of State, Aug. 29, 1853, H. Ex. Doc. 1, 33 Cong. 1 sess. 25.

"To bring out conspicuously the questions to be passed upon, it seems to the undersigned that the facts should be more fully and clearly stated than they are in Mr. Hülsemann's note."

Mr. Marcy's Note,  
Sept. 26, 1853.

"Martin Koszta, by birth a Hungarian, and of course an Austrian subject at that time, took an open and active part in the political movement of 1848-49, designed to detach Hungary from the dominion of the Emperor of Austria. At the close of that disastrous revolutionary movement, Koszta, with many others engaged in the same cause, fled from the Austrian dominions, and took refuge in Turkey. The extradition of these fugitives, Koszta among them, was demanded and pressed with great vigor by Austria, but firmly resisted by the Turkish Government. They were, however, confined at Kutahia, but at length released, with the understanding or by express agreement of Austria that they should leave Turkey and go into foreign parts. Most of them, it is believed, before they obtained their release, indicated the United States as the country of their exile. It is alleged that Koszta left Turkey in company with Kossuth—this is believed to be a mistake; and that he engaged never to return—this is regarded as doubtful. To this sentence of banishment—for such is the true character of their expulsion from Turkey—Austria gave her consent; in truth, it was the result of her efforts to procure their extradition, and was accepted by her as a substitute for it. She had agents or commissioners at Kutahia to attend to their embarkation, and to her the legal consequences of this act are the same as if it had been done directly by herself, and not by the agency of the Ottoman Porte. Koszta came to the United States and selected this country for his future home.

"On the 31st of July, 1852, he made a declaration, under oath, before a proper tribunal, of his intention to become a citizen of the United States and renounce all allegiance to any other state or sovereign.

"After remaining here one year and eleven months, he returned, on account, as is alleged, of private business of a temporary character, to Turkey in an American vessel, claimed the rights of a naturalized American citizen, and offered to place himself under the protection of the United States consul at Smyrna. The consul at first hesitated to recognize and receive him as such; but afterwards, and sometime before his seizure, he, and the American chargé d'affaires *ad interim* at Constantinople, did extend protection to him, and furnished him with a *tezkeréh*—a kind of passport or letter of safe-conduct, usually given by foreign consuls in Turkey to persons to whom they extend protection, as by Turkish laws they have a right to do. It is important to observe that there is no exception taken to his conduct after his return to Turkey, and that Austria has not alleged that he was there for any political object, or for any other purpose than the transaction of private business. While waiting, as is alleged, for an opportunity to return to the United States, he was seized by a band of lawless men—freely, perhaps harshly, characterized in the despatches as 'ruffians,' 'Greek hirelings,' 'robbers'—who had not, nor did they pretend to have, any color of authority emanating from Turkey or Austria, treated with violence and cruelty, and thrown into the sea. Immediately thereafter he was taken up by a boat's crew lying in wait for him, belonging to the Austrian brig-of-war the 'Huszar,' forced on board of that vessel, and there confined in irons. It is now avowed, as it was then suspected, that these desperadoes were instigated to this outrage by the Austrian consul-general at Smyrna; but it is not pretended that he acted under the civil authority of Turkey, but, on the contrary, it is admitted that, on application to the Turkish governor at Smyrna, that magistrate refused to grant the Austrian consul any authority to arrest Koszta.

"The consul of the United States at Smyrna, as soon as he heard of the seizure of Koszta, and the chargé d'affaires of the United States *ad interim* at Constantinople, afterwards interceded with the Turkish authorities, with the Austrian consul-general at Smyrna, and the commander of the Austrian brig-of-war, for his release, on the ground of his American nationality. To support this claim, Koszta's original certificate of having made, under oath, in a court in New York, a declaration of intention to become an American citizen, was *produced* at Smyrna, and an imperfect copy of it placed in the hands of the Imperial Austrian Internuncio at Constantinople. The application to these officers at Smyrna for his liberation, as

well as that of Mr. Brown, our chargé d'affaires, to Baron de Bruck, the Austrian minister at Constantinople, was fruitless, and it became notorious at Smyrna that there was a settled design on the part of the Austrian officials to convey him clandestinely to Trieste—a city within the dominion of the Emperor of Austria. Opportunely, the United States sloop-of-war, the 'St. Louis,' under the command of Captain Ingraham, arrived in the harbor of Smyrna before this design was executed. The commander of the 'St. Louis,' from the representation of the case made to him, felt it to be his duty, as it unquestionably was, to inquire into the validity of Koszta's claim to American protection. He proceeded with deliberation and prudence, and discovered what he considered just grounds for inquiring into Koszta's claim to be discharged on account of his American *nationality*. During the pendency of this inquiry, he received notice of the design to take Koszta clandestinely, before the question at issue was settled, into the dominions of the Emperor of Austria. As there was other evidence of bad faith besides the discovered design of evading the inquiry, Captain Ingraham demanded his release, and intimated that he should resort to force if the demand was not complied with by a certain hour. Fortunately, however, no force was used. An arrangement was made by which the prisoner was delivered into the custody of the French consul-general, to be kept by him until the United States and Austria should agree as to the manner of disposing of him. . . .

"His Imperial Majesty demands that the Government of the United States shall direct Koszta to be delivered to him; that it shall disavow the conduct of the American agents in this affair, call them to a severe account, and tender satisfaction proportionate to the outrage.

"In order to arrive at just conclusions, it is necessary to ascertain and clearly define Koszta's political relation with Austria and with the United States when he was seized at Smyrna. This is the first point which naturally presents itself for consideration, and perhaps the most important one in its bearings upon the merits of the case. . . .

"The conflicting laws on the subject of allegiance are of a municipal character, and have no controlling operation beyond the territorial limits of the countries enacting them. All uncertainty as well as confusion on this subject is avoided by giving due consideration to the fact that the parties to the question now under consideration are two independent nations, and that neither has the right to appeal to its own municipal laws for the rules to settle the matter in dispute, which occurred within the jurisdiction of a third independent power.

"Neither Austrian decrees nor American laws can be properly invoked for aid or direction in this case, but international law furnishes

the rules for a correct decision, and by the light from this source shed upon the transaction at Smyrna are its true features to be discerned.

“Kosztá being beyond the jurisdiction of Austria, her laws were entirely inoperative in his case, unless the Sultan of Turkey has consented to give them vigor within his dominions by treaty stipulations. The law of nations has rules of its own on the subject of allegiance, and disregards, generally, all restrictions imposed upon it by municipal codes.

“This is rendered most evident by the proceedings of independent states in relation to extradition. No state can demand from any other, as a matter of right, the surrender of a native-born or naturalized citizen or subject, an emigrant, or even a fugitive from justice, unless the demand is authorized by express treaty stipulation. International law allows no such claim, though comity may sometimes yield what right withholds. To surrender political offenders (and in this class Austria places Kosztá) is not a duty; but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind. As rendering needless all further argument on this point, the undersigned will recall to Mr. Hülsemann’s recollection what took place in 1849 and 1850, in relation to the reclamation of Polish refugees in Turkey by Russia, and of Hungarian refugees (of whom Kosztá was one) by Austria. This demand was made in concert, as it were, by two powerful sovereigns, while their triumphant armies, which had just put an end to the revolutionary movements in Hungary, stood upon the borders of Turkey, with power to erase her name from the list of nations. She might well apprehend for herself, as the nations of Western Europe apprehended for her, that a refusal in her critical condition would put in jeopardy her existence as an independent power; but she did refuse, and the civilized world justified and commended the act. Both Austria and Russia placed their respective demands on higher grounds than a right of extradition under the law of nations; they attempted to strengthen their claim by founding it upon the obligations of existing treaties—the same, undoubtedly, that are now urged upon the consideration of the United States. Russia and Austria, however, both submitted to the refusal, and never presumed to impute to Turkey the act of refusal as a breach of her duty or a violation of their rights. . . .

“It is to be regretted that this claim for the surrender of Kosztá and his companions, so fully considered then and so signally overruled, should be again revived by Austria under circumstances which make the United States a reluctant party in the controversy. . . .

“Austria appears to have been aware that her right to seize Kosztá could not be sustained by international law, and she has attempted to derive it from certain treaties, or ‘ancient capitulations, by treaty and

usage.' The very slight and inexplicit manner in which this authority is adverted to in Mr. Hülsemann's note apparently indicates, if not a want of confidence in it, at least a desire not to have it scrutinized. . . . It is not shown or alleged that new treaty stipulations since 1849 have been entered into by Turkey and Austria. The 'ancient capitulations' were relied on to support the demand in that year for the surrender of the Hungarian refugees; they were scrutinized, and no such authority as is now claimed was found in them. . . . On this subject it is allowable to resort to the declarations of the public men of the Porte as evidence in regard to an issue of this kind. Their explicit denial may be fairly considered as equivalent to Austria's affirmation without proof, where proof, if it existed, could be so easily adduced. . . . There is now, however, something more decisive from Turkey than the opinion of her public men in opposition to this treaty-claim of Austria. The government of the Porte has pronounced a judgment in relation to the seizure of Koszta, which Austria herself is bound to respect. It has protested against the conduct of the Austrian agents in that affair as unlawful and as a violation of its sovereignty; but not one word of complaint, not a murmur of dissatisfaction, from Turkey against the conduct of the functionaries of the United States at Smyrna has yet reached this government. . . .

"But if Austria really has such authority by treaties as she now claims, it confessedly extends only to 'Austrian subjects.' . . . By the consent and procurement of the Emperor of Austria, Koszta had been sent into perpetual banishment. The Emperor was a party to the expulsion of the Hungarian refugees from Turkey. The sovereign by such an act deprives his subjects to whom it is applied of all their rights under his government. He places them where he can not, if he would, afford them protection. By such an act he releases the subjects thus banished from the bond of allegiance. . . .

"The proposition that Koszta at Smyrna was not an 'Austrian subject' can be sustained on another ground. By a decree of the Emperor of Austria, of the 24th of March, 1832, Austrian subjects leaving the dominions of the Emperor without permission of the magistrate and a release of Austrian citizenship, and with an intention never to return, become '*unlawful emigrants*,' and lose all their civil and political rights at home.—(Ency. Amer., Tit. Emigration, 2 Kent's Com. 50, 51.)

"Koszta had left Austria without permission, and with the obvious and avowed intention never to return: he was, therefore, within the strict meaning of the imperial decree, 'an unlawful emigrant.' He had incurred and paid the penalty of that offence by the loss of all his civil and political rights. . . . It seems to have been the very ob-

ject of the Austrian decree to dissolve the previous political connexion between the 'unlawful emigrant' and the Emperor. In Koszta's case it was dissolved. . . .

"The undersigned is brought, by a fair application of sound principles of law, and by a careful consideration of the facts, to this important conclusion: that those who acted in behalf of Austria had no right whatever to seize and imprison Martin Koszta.

"It will be conceded that the civil authority of Turkey, during the whole period of the occurrences at Smyrna, was dormant, and in no way called into action. Under these circumstances—Austria without any authority, Turkey exercising none, and the American functionaries, as Austria asserts, having no right in behalf of their government to interfere in the affair, (a proposition which will be hereafter contested)—what, then, was the condition of the parties at the commencement of the outrage and through its whole progress? They were all, in this view of the case, without the immediate presence and controlling direction of civil or international law in regard to the treatment of Koszta. The Greek hirelings, Koszta, their victim, and the Austrian and American agents, were, upon this supposition, all in the same condition at Smyrna, in respect to rights and duties, so far as regards that transaction, as they would have been in if it had occurred in their presence in some unappropriated region lying far beyond the confines of any sovereign state whatever; they were the liege subjects of the law of nature, moral agents, bound each and all alike to observe the precepts of that law, and especially that which is confirmed by divine sanction, and enjoins upon all men, everywhere, when not acting under legal restraints, to do unto others whatsoever they would that others should do unto them; they were bound to do no wrong, and, to the extent of their means, to prevent wrong from being done—to protect the weak from being oppressed by the strong, and to relieve the distressed. In the case supposed, Koszta was seized without any rightful authority. He was suffering grievous wrong; any one that could, might relieve him. To do so was a duty imposed, under the peculiar circumstances of the case, by the laws of humanity. Captain Ingraham, in doing what he did for the release of Koszta, would, in this view of the case, be fully justified upon this principle. Who, in such a case, can fairly take offence? Who have a right to complain? Not the wrong-doers, surely, for they can appeal to no law to justify their conduct; they can derive no support from civil authority, for there was none called into action; nor from the law of nature, for that they have violated.

"To place the justification of the American agents still further beyond controversy, the undersigned will now proceed to show that Koszta, when he was seized and imprisoned at Smyrna, had the

national character of an American, and the Government of the United States had the right to extend its protection over him. . . .

"Mr. Hülsemann, as the undersigned believes, falls into a great error—an error fatal to some of his most important conclusions—by assuming that a nation can properly extend its protection only to native-born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. . . . It is a maxim of international law that domicile confers a national character; it does not allow anyone who has a domicile to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality. These are important principles in their bearings upon the questions presented in Mr. Hülsemann's note, and are too obvious to be contested; but as they are opposed to some of the positions taken by Austria, the undersigned deems it respectful in such a case to sustain them by reference to authorities.

"'The position is a clear one, that if a person goes into a foreign country and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a *subject* for all civil purposes, whether that country be hostile or neutral.' (1 Kent's Com. 75.)

"Again: the same authority says that 'in the law of nations, as to Europe, the rule is, that men take their national character from the general character of the country in which they reside.' (Ibid. 78.) . . .

"The most approved definitions of a domicile are the following:

"'A residence at a particular place, accompanied with positive or presumptive proof of continuing there for an unlimited time.'—(1 Binney's Reports, 349.) 'If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence of a few days.'—(The Venus, 8 Cranch, 279.) 'Vattel has defined domicile to be a fixed residence in any place, with an intention of always staying there. But this is not an accurate statement. It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.'—(Story's Con. of Laws, § 43.) 'A person who removes to a foreign country, settles himself there, and engages in the trade of

the country, furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides.'—(The Venus, 8 Cranch, 279.)

"Apply these principles to the case under consideration, and the inevitable result is that Koszta had a domicile in the United States. He came to and resided in this country one year and eleven months. He came here with the intention of making it his future abode. This intention was manifested in several ways, but most significantly by his solemn declaration upon oath. There can be no better evidence of his design of making the United States his future home than such a declaration; and to this kind of evidence of the intention, the indispensable element of true domicile, civilians have always attached importance. (Phillimore, § 188.) . . .

"The establishment of his domicile here invested him with the national character of this country, and with that character he acquired the right to claim protection from the United States, and they had the right to extend it to him as long as that character continued.

"The next question is, Was Koszta clothed with that character when he was kidnapped in the streets of Smyrna, and imprisoned on board of the Austrian brig-of-war 'Huszar'? The national character acquired by residence remains as long as the domicile continues. . . . To lose a domicile when once obtained, the domiciled person must leave the country of his residence with the intention to abandon that residence, and must acquire a domicile in another. Both of these facts are necessary to effect a change of domicile; but neither of them exists in Koszta's case. The facts show that he was only temporarily absent from this country on private business, with no intention of remaining permanently in Turkey, but, on the contrary, was at the time of his seizure awaiting an opportunity to return to the United States. . . .

"This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pays for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way, and to the same extent as theirs, liable to contribute to the support of the government. In war he shares equally with them in the calamities which may befall the country; his services may be required for its defence; his life may be perilled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of government are undis-



tinguishable; and what reasons can be given why, so far at least as regards protection to person and property abroad as well as at home, his rights should not be co-extensive with the rights of native-born or naturalized citizens? By the law of nations they have the same nationality; and what right has any foreign power, for the purpose of making distinction between them, to look behind the character given them by that code which regulates national intercourse? When the law of nations determines the nationality of any man, foreign governments are bound to respect its decision. . . .

“There is another view of this case which places the conduct of the agents of this government at Smyrna upon equally defensible grounds. . . .

“By the laws of Turkey and other eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates and other European establishments in the East, are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a large number of such *protégés*. International law recognizes and sanctions the rights acquired by this connexion.

“‘In the law of nations as to Europe, the rule is, that men take their national character from the general character of the country in which they reside; and this rule applies equally to America. But in Asia and Africa an immiscible character is kept up, and Europeans trading under the protection of a factory take their national character from the establishment under which they live and trade. This rule applies to those parts of the world from obvious reasons of policy, because foreigners are not admitted there, as in Europe “and the western part of the world,” into the general body and mass of the society of the nation, but they continue strangers and sojourners, not acquiring any national character under the general sovereignty of the country.’—(1 Kent’s Com. 78-9.)

“The Lords of Appeals in the High Court of Admiralty in England decided in 1784, that a merchant carrying on trade at Smyrna, under the protection of a Dutch consul, was to be considered a Dutchman as to his national character. (Wheaton’s Inter. Law, 384, 3 Rob. Adm. Reports, 12.)

“This decision has been examined and approved by the eminent jurists who have since written treatises on international law.

“According to the principle established in this case, Koszta was invested with the nationality of the United States, if he had it not before, the moment he was under the protection of the American

consul at Smyrna and the American legation at Constantinople. That he was so received is established by the *tezkereh* they gave him, and the efforts they made for his release. . . .

“Having been received under the protection of these American establishments, he had thereby acquired, according to the law of nations, their nationality; and when wronged and outraged as he was, they might interpose for his liberation, and Captain Ingraham had a right to cooperate with them for the accomplishment of that object. The exceptions taken to the manner of that cooperation remain to be considered. . . .

“It has excited some surprise here that, after a consideration of the circumstances, an impression should be entertained in any quarter that Captain Ingraham either committed or meditated hostility towards Austria on that occasion. . . . The first aggressive act in this case was the seizure of Koszta at Smyrna, committed by the procurement of the Austrian functionaries; the first improper use of a national ship, the imprisonment of Koszta therein, was made by the commander of the Austrian brig ‘Huszar.’ That ship was converted into a prison for the illegal detention of a person clothed with the nationality of the United States, and consequently entitled to their protection. If Austria upholds, as it appears she does, the conduct of the commander of the ‘Huszar,’ she is in fact the first aggressor. This act of the commander of the ‘Huszar’ led to the series of other acts which constitute the ground of complaint against the United States. . . .

“There is a consideration probably not brought to the notice of Austria, and not sufficiently regarded by others, which places the acts of Captain Ingraham in a true light, and repels the inference of intended hostile demonstrations towards Austria. It was the understanding of the parties that Koszta should be retained at Smyrna while the question of his nationality was pending. Captain Ingraham received satisfactory evidence of a design, on the part of the Austrian functionaries at Smyrna and Constantinople, to disregard this arrangement, and remove him clandestinely from the ‘Huszar’ on board of a steamer, for the purpose of taking him to Trieste. . . . The captain of the ‘St. Louis’ was placed in the perplexing alternative of surrendering their captive, without further efforts, to the sad fate which awaited him, or to demand his immediate release, and, in case of refusal, to enforce it. . . . It is not just to Captain Ingraham to look at the affair as it was at the precise point of time when the demand for the release of Koszta was made. The antecedent events qualify and legalize that act. The Austrian functionaries had obtained the possession of the person of Koszta, not in a fair or allowable way, but by violating the civil laws of Turkey and the rights of

humanity. Under these circumstances, their custody of him was entitled to no respect from the agent of the government which, by virtue of his nationality, had a right to protect him. . . .

“The undersigned yields a ready assent to that part of Mr. Hülse-  
mann’s note relative to the war-making power. The doctrine con-  
tained in it is sound, and well sustained by most approved authorities;  
but the undersigned has not been able to discover its applicability to  
the case under consideration. . . .

“Before closing this communication the undersigned will briefly  
notice the complaint of Austria against Captain Ingraham for vio-  
lating the neutral soil of the Ottoman empire. The right of Austria  
to call the United States to an account for the acts of their agents  
affecting the sovereign territorial rights of Turkey is not perceived,  
and they do not acknowledge her right to require any explanation.

“If anything was done at Smyrna in derogation of the sovereignty  
of Turkey, this Government will give satisfactory explanation to  
the Sultan when he shall demand it, and it has instructed its minister  
resident to make this known to him. He is the judge, and the only  
rightful judge, in this affair, and the injured party too. He has inves-  
tigated its merits, pronounced judgment against Austria, and ac-  
quitted the United States; yet, strange as it is, Austria has called the  
United States to an account for violating the sovereign territorial  
rights of the Emperor of Turkey. . . .

“The President does not see sufficient cause for disavowing the  
acts of the American agents which are complained of by Austria.  
Her claim for satisfaction on that account has been carefully consid-  
ered, and is respectfully declined.

“Being convinced that the seizure and imprisonment of Koszta  
were illegal and unjustifiable, the President also declines to give his  
consent to his delivery to the consul-general of Austria at Smyrna;  
but, after a full examination of the case, as herein presented, he has  
instructed the undersigned to communicate to Mr. Hülse-  
mann his confident expectation that the Emperor of Austria will take the  
proper measures to cause Martin Koszta to be restored to the same  
condition he was in before he was seized in the streets of Smyrna on  
the 21st of June last.”

Mr. Marcy, Sec. of State, to Mr. Hülse-  
mann, Austrian chargé d’affaires,  
Sept. 26, 1853, H. Ex. Doc. 1, 33 Cong. 1 sess. 30.

See, also, S. Ex. Docs. 40 and 53, 33 Cong. 1 sess.; H. Ex. Doc. 91, 33  
Cong. 1 sess.

“Under an arrangement between the agents of the United States  
and of Austria, he [Koszta] was transferred to the custody of the  
French consul-general at Smyrna, there to remain until he should be  
disposed of by the mutual agreement of the consuls of the respective

Governments at that place. Pursuant to that agreement, he has been released, and is now in the United States."

President Pierce, annual message, Dec. 5, 1853, *Richardson's Messages*, V. 210.

## 2. INTERPRETATIONS.

### § 491.

In a letter to Mr. Marcy, August 8, 1853, Mr. Dainese, of the United States consulate at Constantinople, who appears then to have been in the United States, said that Koszta, though only, to use the words of Mr. Webster, an affiliated citizen of the United States, had, according to the principles adopted by the Turkish Government in relation to foreigners residing in or traveling through Turkey, a full right to claim the protection of the American flag. Mr. Dainese stated that in Turkey all natives whose parents came from a European country, or from a country not subject to the Sultan, as well as all foreigners residing in or traveling through the Turkish dominions, had a right to live, as most of them did, under the protection of such one of the representatives of the Christian powers as might, on their application, admit them to that relation.

H. Ex. Doc. 82, 34 Cong. 3 sess. 261-264.

"From the statement of the case it is quite evident that Costa was not, at the time he was kidnapped, a subject of the Emperor of Austria. He had withdrawn from his allegiance to the Austrian Government, and the course of that Government towards him was at least an implied consent to that withdrawal. By acts concurred in by both parties, the ties of allegiance were severed. He had renounced on his part, as Austria had on hers, all claims to reciprocal rights or duties resulting from their former political connection as sovereign and subject, and they stood towards each other as if no such connection had ever existed. If, however, there had been some foundation for a claim by Austria, as under the obligation of allegiance to her, when he was seized at Smyrna, the case would not, perhaps, have been much changed; it would only have afforded some better pretext for the outrage than now exists, but would not have altered its character or legal consequences. While at Smyrna, Austria had no jurisdiction over the person of Costa, nor do I understand that there was at the time of the seizure any pretense that it was made by Austrian authority in any legal form.

"The Turkish authorities explicitly disavow any participation in the discreditable act. . . . The seizure of Costa and the outrage committed on him can therefore be regarded in no other light than the lawless act of private wrongdoers, and the continuation of that

act—the taking him from the sea and putting him on board of the Austrian brig of war, the *Hussar*, and confining him in irons—was precisely of the same character, a wanton and illegal violation of his personal rights. The interference of mere bystanders for his relief, in such a case of oppression and cruelty, could be sustained upon the broad principles of humanity. But the justification of Captain Ingraham's conduct is placed on other and more clearly defined grounds. Whatever may have been Costa's citizenship (not being a subject of the Ottoman Porte) he was, while at Smyrna, a Frank or sojourner, and might place himself under any foreign protection he chose to select, and the Turkish laws respect the rights he thus acquired. He did place himself under the protection of an American consul at Smyrna, and our legation at Constantinople, and was at once clothed with the nationality of the protecting power, and consequently became entitled to be regarded and respected while in that situation as a citizen of the United States. The American consul at Smyrna did nothing more than his duty in claiming for him the protection due to one of our citizens, and Captain Ingraham is justified by his Government for using the means he did for procuring his release from illegal imprisonment.

“You are therefore instructed by the President to present these views to the Austrian legation at Constantinople, if Costa has not been released, and to the French consul at Smyrna, if he retains him in custody by virtue of the arrangement made on the subject, as the views of the Government of the United States, and demand that the prisoner be released and restored to the same condition he was in at the time of his seizure in the streets of Smyrna. It is presumed that the Imperial Government of Austria will be very unwilling to do anything which will in any way connect itself with this outrage, and that it will disavow the pretext that the procedure was instigated by it, or has in any manner had its subsequent countenance.”

Mr. Marcy, Sec. of State, to Mr. Marsh, min. to Turkey, No. 27, Aug. 26, 1853, MS. Inst. Turkey, I. 371.

See, also, Mr. Marcy to Mr. Marsh, unofficial, Aug. 26, 1853, MS. Inst. Turkey, I. 374; Mr. Marcy Sec. of State, to Mr. Oflay, consul at Smyrna, Aug. 31, 1853, 17 MS. Desp. to Consuls, 67.

“No complaint has reached this Department from the Turkish Government against Commander Ingraham, of the U. S. sloop of war *St. Louis*, on account of his conduct at Smyrna in June and July last, with reference to the affair of Martin Koszta; and from the tenor of the despatches from your legation such a complaint could scarcely be expected. In the event, however, that this reserve should be occasioned by an apprehension on the part of the Porte that the representations which it might think proper to address to us upon the subject

would not be respectfully received, the President directs me to instruct you to assure the Turkish authorities that, if the Sultan's Government should in any way feel aggrieved by the proceedings of Commander Ingraham, this Government will not hesitate, upon receiving a statement of the grounds of the grievance, to take it into consideration, with a view to such redress as the circumstances may call for."

Mr. Marcy, Sec. of State, to Mr. Marsh, min. to Turkey, No. 31, Sept. 27, 1853, MS. Inst. Turkey, I. 377.

"I have just had a full conversation with Baron Gerolt, the Prussian minister, in relation to the case of your brother, Henry D'Oench. The positions maintained by this Department in the case of Koszta will be acted on in all cases to which they may be applicable; but it is apprehended that there are such circumstances of difference in your brother's case as may embarrass the Government in their efforts to procure his discharge.

"Prussia regarded him as a fugitive from justice and claimed from the authorities of Hamburg his extradition as a matter of right, and Hamburg yielded to this claim as a matter of duty arising from its political connection with her. Having got possession of his person and brought him within her jurisdiction, as she contends, in a strictly legal manner, she maintains her right to inflict upon him the punishment to which he has been sentenced by the tribunals of the country for a violation of its laws committed while he was a subject of the King of Prussia. The change of national character subsequent to the alleged offense does not release an offender from penalties previously incurred when legally brought within the jurisdiction of the country whose laws have been violated. It may be found that in this respect there is a difference between the case of your brother and that of Koszta. You may, however, be assured that this Government will use all proper means to effect his release."

Mr. Marcy, Sec. of State, to Mr. D'Oench, Nov. 16, 1853, 42 MS. Dom. Let. 54.

Sec. to the same effect, Mr. Marcy, Sec. of State, to Mr. Thum, Nov. 18, 1853, stating that the American consul at Hamburg had been instructed "to communicate to this Department all information he may possess in regard to the arrest, surrender, and present condition of Mr. D'Oench; also to ascertain whether any extradition treaty is in force between Hamburg and Prussia by which the former is bound to deliver up to the latter persons charged with criminal offenses, and, more especially, whether the stipulations of such treaty, if any exist, embrace political offenders." (42 MS. Dom. Let. 56.)

It appears that Henry D'Oench was the editor of a newspaper in Silesia, and took part in the revolutionary movement of 1848. Being charged with political offences, he was a fugitive on German soil for a year, when, in March, 1850, he came to the United States. Feb. 12, 1852,

he made a declaration of intention, and sailed for Hamburg on business and to claim an inheritance. July 6, 1852, he was arrested by the Hamburg police and delivered over to the Prussian authorities, by whom he was taken to Silberberg to serve a sentence of two years and nine months' imprisonment. (Mr. Barnard, min. to Prussia, to Mr. Marcy, Sec. of State, No. 137, Sept. 13, 1853, 8 MS. Desp. from Prussia.)

There is nothing in the consular despatches from Hamburg throwing light on the case, which seems not to have been diverted from the course it had taken.

Simon Tousig, a native of Austria, on his return to that country from the United States, was arrested and imprisoned. Mr. Henry R. Jackson, then American chargé d'affaires at Vienna, proposed, on the strength of Koszta's case, to demand his release. Mr. Marcy replied: "Assuming all that could possibly belong to Tousig's case—that he had a domicile here and was actually clothed with the nationality of the United States—there is a feature in it which distinguishes it from that of Koszta. Tousig voluntarily returned to Austria and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction and thereby subjected himself to them. If he had incurred penalties or assumed duties while under these laws, he might have expected they would be enforced against him, and should have known that the new political relation he had acquired, if indeed he had acquired any, could not operate as a release from these penalties. Having been once subject to the municipal laws of Austria and while under her jurisdiction violated these laws, his withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them."

Mr. Marcy, Sec. of State, to Mr. Jackson, chargé d'affaires at Vienna, Jan. 10, 1854, MS. Inst. Austria, I. 89; 54 Brit. & For. State Papers, 467.

See Mr. Wharton, Act. Sec. of State, to Mr. Crounse, Aug. 10, 1891, 183 MS. Dom. Let. 21.

"As this Department grants passports to citizens of the United States only, it certainly recognizes in its representatives abroad no authority to grant them to such as are not citizens. At the same time it does not deny to them the right of extending a certain degree of protection to those possessing only the inchoate rights of citizenship. The nature and extent of this protection, however, must depend in a great degree upon circumstances, and these will vary with almost every case. Thus a foreigner who comes to this country, and, renouncing all allegiance to any other power, declares his intention of becoming a citizen, and afterwards returns to the country of his birth for a temporary purpose only, not losing thereby his domicile

here, is clothed with a nationality which entitles him to a greater degree of protection than could properly be extended to one who, as in the case of Mr. Willrich, after declaring his intention to become a citizen of the United States, shortly after departs therefrom, and remains abroad a sufficient length of time to warrant the belief that he has either abandoned that intention or is indifferent about carrying it into effect."

Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 13, July 7, 1854, MS. Inst. Prussia, XIV. 218.

This instruction, when it speaks of a person "who comes to this country, and, renouncing all allegiance to any other power, declares his intention," makes an assumption the grounds of which are not apparent, since an alien, in declaring his intention to become a citizen, does not renounce his allegiance to any other power, but merely declares his intention to do so.

"This Government can not rightfully and does not claim of foreign powers the same consideration for a declaration of intention to become a citizen, as for a regular passport. The declaration indeed is *prima facie* evidence that the person making it was, at its date, domiciled in the United States, and entitled thereby, though not to all, to certain rights of a citizen, and to much more consideration when abroad, than is due to one who has never been in our country; but the declarant, not being a citizen under our laws, even while domiciled here, can not enjoy all the rights of citizenship either here or abroad. He is entitled to our care, and in most circumstances we have a right to consider him as under our protection, and this Government is disposed and ready to grant him all the benefits he can or ought to receive in such a situation. If such individual, however, afterwards leave this country, repair to another, and there take up his permanent abode, his connection with the United States is dissolved, and his intention to become a citizen must be considered to have been abandoned. Under the circumstances the previous declaration ceases to be available for any purposes whatever. But when a person with a fair intent has made a declaration and goes abroad for any purpose not incompatible with the objects of the declaration, and the legation has certified to the genuineness of his papers, the Government of the United States has done all that can be required or reasonably expected, and can have no just cause of complaint if other governments see fit to refuse to give the same effect to such papers as they usually give to regular passports in the hands of our citizens."

Mr. Marcy, Sec. of State, to Mr. Jackson, chargé d'affaires at Vienna, No. 17, Sept. 14, 1854, MS. Inst. Austria, I. 100.

See also Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, April 13, 1854, MS. Inst. Gr. Br. XVI. 285.



"In your No. 232 you desire to be informed as to the extent to which you may afford protection or furnish passports to such persons as have made formal declarations, before the competent authorities of the United States, of their intention to become citizens, but who have not been legally naturalized.

"You state that in these cases you had replied that you 'could only use (your) friendly offices with the Peruvian Government if (the applicant)' required protection, but 'that (you) could not interfere officially, as in the case of a citizen of the United States, or of foreigners who had gone through all the formalities required by law to become naturalized.'

"The Department approves of the position you have assumed in this respect, and also of your course in refusing 'to grant passports to such persons except to enable them to return to the United States; inserting the condition that they were to proceed direct to some port or place within the territories of the Union, or otherwise the passport to be void after a stipulated time.'

"But, that no misapprehension may arise with regard to the precise attitude of the Department in relation to this subject, I embody here an extract from an instruction addressed to our minister at The Hague, on the 9th December last, by which you will be guided in all similar contingencies:

"In your No. 4 enquiry is made whether you are to restrict the granting of passports entirely to American citizens. As this Department grants passports only to *bona fide* citizens of the United States, and as a passport is nothing more than a certificate of citizenship, it follows, as a matter of course, that you can with propriety give a passport neither to an alien who may have become domiciled in the United States, nor to a foreigner who has merely declared his intention to become an American citizen. Both of these classes of persons, however, may be entitled to some recognition by this Government. The most that can be done by you for them is to certify to the genuineness of their papers when presented for your attestation, and when you have no reasonable doubts of their authenticity. The European authorities may pay such respect to these documents as they may think proper."

Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, No. 23, Dec. 28, 1854, MS. Inst. Peru, XV. 150.

After the passage above quoted, Mr. Marcy answered an inquiry as to how far a minister of the United States might use his friendly offices with the Government to which he was accredited in favor of foreigners whose nation was not represented by a diplomatic agent or a consul. This inquiry was made by Mr. Clay with reference to the case of a Mexican who had applied to him for protection. Mr. Marcy replied that any good offices which a minister might undertake under such circumstances to render must be "entirely of a per-

sonal character," or such as might be "demanded by humanity or the pressing urgency of the case;" but that, in rendering such services, the minister "must exercise very great prudence, lest he give offence to the government near which he resides, or compromise his own immunities by seeming to interfere with the administration of " its " internal affairs."

"Your letter of the 9th instant has been received. So far as I understand your case, it is not at all like that of M. Koszta . . . Koszta, it will be recollected, did not return to Austria or any of its dominions, but its officers attempted to seize him in a foreign country without any right to do so. Had K. been within the jurisdiction of Austria when he was seized, the whole character of the case would have been changed, and the forcible taking of him from the legal custody of Austrian officers could not have been defended on any principle of municipal or international law."

Mr. Marcy, Sec. of State, to Harry, Baron de Kalb, July 20, 1855, 44 MS. Dom. Let. 212. See this letter, more fully, *infra*, § 537.

"With reference to the case of Mr. Robert G. Derbyshire, I have to inform you that his mere declaration of an intention to become a citizen of the United States, if he is resident abroad and has no domicile in the United States, imposes no obligation upon you to apply to the Nicaraguan Government for redress in his behalf on account of the seizure of his property in the City of Granada.

"Supposing Mr. John Fearon to be a citizen or domiciled resident, there would be no impropriety in your addressing a note to the proper officer at the capital of Honduras, setting forth the grievances of which Mr. Fearon complains in his letter to you of the 21st of June, requesting an inquiry into the case and such punishment of the officers complained of as the result of the inquiry may call for."

Mr. Marcy, Sec. of State, to Mr. Wheeler, min. to Cent. Am., No. 12, Oct. 15, 1855, MS. Inst. Am. States, XV. 245. See *infra*, pp. 892-894.

"The impression of Mr. Goundie [U. S. consul at Zurich], as stated by you, that I entertained the opinion that a declaration on the part of an alien of his intention to become a citizen of the United States 'entitles the declarant, while abroad, with the intention to return, to the same rights and privileges as a citizen of the United States,' is the result of some misapprehension originating I know not how. I have never expressed and am very far from holding any such opinion. That a person under the circumstances stated by Mr. Goundie would be entitled to more consideration from an American minister or consul abroad than one who has entered into no such relation with this country there can be no doubt, but not being a citizen under our laws, even while domiciled here, he can not enjoy all the

rights of one either here or abroad. This is the opinion expressed by Mr. Marcy, and I do not see how a different one can be reasonably entertained."

Mr. Cass, Sec. of State, to Mr. Fay, min. to Switzerland, Nov. 12, 1860, MS. Inst. Switz. I. 85.

In February, 1862, two American citizens, Henry Myers and J. F. Tunstall, members of the crew of the Confederate steamer *Sumter*, then lying at Gibraltar, took passage on the French merchant steamer *Ville de Malaga*, for the purpose of proceeding to Cadiz, in order to obtain a supply of coal for the Confederate cruiser. The *Ville de Malaga* having called at Tangier, Morocco, Myers and Tunstall went ashore, and while walking in the street were, with the aid of a military guard furnished by the Moorish Government, arrested by the United States consul and conveyed to the consulate, where they were kept in irons till the arrival of the U. S. S. *Ino*, on which, with the aid of a similar guard, they were shipped for the United States. They were subsequently committed into military custody at Fort Warren, Boston. The action of the United States in this case having been criticised on the ground that it conflicted with the position taken by the same government in the Koszta case, Mr. Seward said: "It has been assumed that in that instance the United States not only demanded impunity everywhere for all persons who were engaged, under any circumstances, in armed hostility to their own government, but even assumed a cosmopolitan championship for them. But this is very erroneous. Koszta had indeed been a revolutionist in Austria, and he was delivered by the United States authorities from the hands of Austrian agents in Smyrna, a province of Turkey, which is a Mahometan power whose relations to Christian states are the same as those of Morocco.

"But the facts were that the civil war in Austria was at an end. Martin Koszta was a Hungarian by birth, and was a refugee; he had fled, and had been decreed an outlaw by Austria. He had taken asylum in America and had, under our laws, become domiciled and nationalized as an American, and as such was held entitled to the protection of this government under its treaty with the Sultan of Turkey. He held a guarantee of protection from our consul at Smyrna, a protection which was in conformity with the treaty and with our own laws. The agents of the Austrian Government seized him and undertook to carry him away by force, against the remonstrances of our consul, and in defiance of the authorities of Turkey, and to subject him to arbitrary punishment as a subject of a state from which he had been transferred to the United States. It is not easy to understand how the proceedings of this government in that

case can be deemed to commit it to tolerate revolution against itself by our own disloyal citizens."

Mr. Seward, Sec. of State, to Mr. McMath, consul at Tangier, April 28, 1862, Dip. Cor. 1862, 873, 877.

"The late distinguished Secretary of State, Mr. Marcy, was very careful in his elaborate letter concerning the case of Martin Koszta not to commit this government to the obligation or to the propriety of using the force of the nation for the protection of foreign-born persons who, after declaring their intention to become at some future time citizens of the United States, leave its shores to return to their native country. He showed clearly that Koszta had been expatriated by Austria, and required to reside outside her jurisdiction; that at the time of his seizure he was not on Austrian soil, or where Austria could claim him by treaty stipulations; that the seizure was an act of lawless violence, which every law-abiding man was entitled to resist; and he took especial care to insist that the case was to be judged, not by the municipal laws of the United States, not by the local laws of Turkey, not by the conventions between Turkey and Austria, but by the great principles of international law. It is true that in the concluding part of that masterly dispatch he did say that a nation might at its pleasure clothe with the rights of its nationality persons not citizens, who were permanently domiciled in its borders. But it will be observed by the careful reader of that letter that this portion is supplemental merely to the main line of the great argument, and that the Secretary rests the right of the government to clothe the individual with the attributes of nationality, not upon the declaration of intention to become a citizen, but upon the permanent domicil of the foreigner within the country.

"To extend this principle beyond the careful limitation put upon it by Secretary Marcy would be dangerous to the peace of the country. It has been repeatedly decided by this Department that the declaration of intention to become a citizen does not, in the absence of treaty stipulations, so clothe the individual with the nationality of this country as to enable him to return to his native land without being necessarily subject to all the laws thereof."

Mr. J. C. B. Davis, Assist. Sec. of State, to Mr. Fox, consul at Trinidad de Cuba, May 12, 1869, S. Ex. Doc. 108, 41 Cong. 2 sess. 202-203.

The full substance of the correspondence between Mr. Marcy and the Chevalier Hülseman concerning the Koszta case has been given, and to this have been added other discussions of and comments upon the case by Mr. Marcy himself and his immediate successors, in order that the misconceptions that have so widely prevailed on the subject may be removed. First of all, it is seen that the supposition that

Mr. Marcy held that Koszta's declaration of intention gave him an American character and a claim to the protection of the United States is not only destitute of foundation, but is directly opposed to his repeatedly expressed opinion. He referred to the declaration of intention merely as an evidence of domicile. In the second place, there likewise disappears the supposition that he held that a domiciled alien, even where he had made a declaration of intention, was entitled to the same protection abroad as a citizen of the United States, or yet to protection against the claims of the country of his original allegiance lawfully asserted, either there or in a third country. In the third place, it appears by Mr. Marcy's instruction to Mr. Marsh, of Aug. 26, 1853, that the claim that Koszta had at the time of his seizure an American character was based, in the first instance, *exclusively* upon his having been duly admitted to American protection, according to the recognized usage in Turkey.

The links in Mr. Marcy's chain of reasoning were (1) that, as the seizure and rescue of Koszta took place within the jurisdiction of a third power, the respective rights of the United States and of Austria, as parties to the controversy that had arisen concerning that transaction, could not be determined by the municipal law of either country, but must be determined by international law; (2) that, as the previous political connection between Koszta and the Austrian Government had, by reason of the circumstances of his emigration and banishment, been, even under the laws of Austria, dissolved, he could not at the time of his seizure be claimed as an Austrian subject, nor could his seizure as such be justified by Austria, either under international law or her treaties with Turkey; (3) that the seizure in its method and circumstances constituted an outrage so palpable that any bystander would have been justified, on elementary principles of justice and humanity, in interposing to prevent its consummation; (4) that there were, however, special grounds on which the United States might, under international law—that being under the circumstances the only criterion—assert a right to protect Koszta; (5) that, although he had ceased to be a subject of Austria and had not become a citizen of the United States, and therefore could not claim the rights of a citizen under the municipal laws of either country, he might under international law derive a national character from domicile; (6) that, even if Koszta was not, by reason of his domicile, invested with the nationality of the United States, he undoubtedly possessed, under the usage prevailing in Turkey, which was recognized and sanctioned by international law, the nationality of the United States, from the moment when he was placed under the protection of the American diplomatic and consular agents, and received from them his *tezkereh*; (7) that, as he was clothed with the nationality of the United States, and as the first aggressive act was com-

mitted by procurement of the Austrian functionaries, Austria, if she upheld what was done, became in fact the first aggressor, and was not entitled to an apology for the measures adopted by Captain Ingraham to secure his release; (8) that Captain Ingraham's action was further justified by the information which he received of a plot to remove Koszta clandestinely, in violation of the amicable arrangement under which he was to be retained at Smyrna while the question of his nationality was pending; (9) and finally, that, as the seizure of Koszta was illegal and unjustifiable, the President could not consent to his delivery to the consul-general of Austria at Smyrna, but expected that measures would be taken to cause him to be restored to the condition he was in before he was seized.

By an agreement signed July 2, 1853, by the American consul and the Austrian consul-general at Smyrna, Koszta had been placed in the custody of the French consul-general, who was not to deliver him up except upon a requisition of both those officials. Such a requisition, addressed to the French consul-general, was signed by them October 14, 1853, under instructions received from the American and Austrian ministers at Constantinople; and on the same day Koszta took passage on the bark *Sultana* for Boston. The Austrian minister at Constantinople had sought in the correspondence to reserve the right of Austria to proceed against Koszta in case he should again be found in the Turkish dominions; but the American consul at Smyrna refused to sign a requisition containing such a reservation, and the requisition on which Koszta was, with Austria's concurrence, actually released, was unconditional.<sup>a</sup>

From the understanding that had been officially established by Mr. Marcy and his successors, as to the exceptional nature and peremptory limitations of the Koszta case, a departure was years afterwards abruptly made, when, as is elsewhere shown,<sup>b</sup> it was intimated (1) that, according to Mr. Marcy, a declaration of intention entitles the declarant to the protection of the United States in countries other than that of his origin, and (2) that where an individual, after making his declaration of intention, leaves the United States, the Government may require that he be permitted to return and be naturalized. Had occasion arisen to make either of these intimations effective, the necessity of defending them exclusively on their merits, without the aid of precedent, doubtless would have become apparent, to say nothing of the fact that, from the second conception, a certain practical and awkward inconsequence would have resulted if the individual, after his duress was removed, had decided not to come to the United States, or if, even after returning to the United States, he had declined to be naturalized.

<sup>a</sup> 44 Brit. & For. State Pap. 1036.

<sup>b</sup> Supra, pp. 330-340.

In 1885 a new position, more nearly associable in theory with the Koszta case, was taken by the Department of State, when the printed personal instructions to the diplomatic agents of the United States were amended so as to provide (section 118) that "nothing herein contained is to be construed as in any way abridging the right of persons domiciled in the United States, but not naturalized therein, to maintain internationally their status of domicile, and to claim protection from this Government, in the maintenance of such status." The origin of this amendment, in a report of Dr. Wharton, as solicitor of the Department of State, is elsewhere shown;<sup>a</sup> and the amendment is cited, in Wharton's International Law Digest, with the comment that "when the party making the declaration [of intention] has acquired a domicile in this country" the Government of the United States "will protect him in all the rights which the law of nations attaches to domicile."<sup>b</sup> In the President's message of Dec. 8, 1885, however, it was stated that "the rights which spring from domicile in the United States, especially when coupled with a declaration of intention to become a citizen," were "worthy of definition by statute;" that such a person gained "an inchoate status which legislation may properly define;" that, under the laws of certain States and Territories, he enjoyed the "local franchise" and possessed "rights of citizenship to a degree which places him in the anomalous position of being a citizen of a State and yet not of the United States within the purview of Federal and international law;" and that it was important, "within the scope of national legislation, to define this right" of "alien domicile" as distinguished from "Federal naturalization."

By this recommendation, the President, whose views on the subject no doubt were shared by the Secretary of State, does not appear to have thought it desirable that the United States should forsake, as the basis of its diplomatic action, the usual and definite test of citizenship, embodied in existing law, for the subjective and circumstantial test of domicile. But qualified as the recommendation was, Congress took no action upon it; and the view embodied in the amendment of the personal instructions, although it was occasionally reiterated in terms similarly indefinite in other documents, seems gradually to have fallen into desuetude. It directly appears, indeed, that Mr. Bayard became convinced that the proposed innovation, to which he had given a formal sanction, did not afford a satisfactory rule of action. In the case of Baron Seillière, given below, he says: "The question of domicile is a matter of inference from circumstances which are often shifting, uncertain, and complex. . . . The

<sup>a</sup> Supra, p. 522.

<sup>b</sup> Wharton Int. Law Dig. II. 359.

rights of domicile and of nationality are not identical, and are often entirely distinct and independent." When the instructions to diplomatic agents were revised in 1897, during the Secretaryship of Mr. Olney, the reference to domicile was omitted.

"The criterion by which Koszta's and Burnato's cases are to be measured in examining questions arising with respect to aliens who have declared, but not lawfully perfected, their intention to become citizens of the United States, is very simple.

"When the party, after such declaration, evidences his intent to perfect the process of naturalization by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of *original allegiance* whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted. Koszta and Burnato were both resident in the United States, and their absence was that of temporary character, *animo revertendi*, which does not conflict with the continuity of residence required by the statute. Koszta was arrested by the authorities of Austria in the dominions of a third state. Burnato, who had definitely abandoned Mexican domicile, was held for military service in Mexico on the occasion of a transient return.

"Mr. Walsh, however, as my predecessors have remarked, had given no proof of retention of American residence. On the contrary, immediately after his declaration of intention, he established a commercial domicile in Mexico under circumstances which would have sufficed to disrupt his continued residence in the United States and prevent his naturalization under the statute.

"By so removing to Mexico, he must be deemed to have abandoned his declared intention to become an American citizen."

Mr. Bayard, Sec. of State, to Mr. Mackey, Aug. 5, 1885, Wharton's Int. Law Dig. II. 359-360.

See, also, Mr. Bayard, Sec. of State, to Mr. Beard, April 8, 1885, 155 MS. Dom. Let. 13; Mr. Bayard, Sec. of State, to Mr. Denby, min. to China, No. 197, May 5, 1887, MS. Inst. China, IV. 269.

The view above expressed reflects the gloss first put upon the Koszta case in 1884. (Supra, pp. 339-340.) The intimation, however, that a declarant acquired special rights as against the country of his "*original allegiance*" seems to be directly in conflict with the theory advanced in 1884 that he was entitled to protection only in third states, as well as with the position taken by Mr. Marcy, not only in Koszta's case, but also in Tousig's case and on other occasions; nor is it borne out by an examination of the position actually taken by the United States in the case of Burnato. The facts in Burnato's case are as follows:



In 1880 a report was received at the Department of State that five American citizens had been impressed into the military service in Mexico. Among the persons mentioned was Felipe Burnato, a native of Mexico. It appeared that in November, 1879, Burnato was arrested at Piedras Negras by custom-house guards for smuggling 18 bottles of beer into Mexico. For this violation of the revenue laws he was "sentenced" by the collector of customs at Piedras Negras to five years' service as a soldier in a Mexican battalion. With the premise that there was "scarcely any act of which a nation should be less tolerant than that of a neighboring power forcibly impressing its citizens into their military service," Mr. Morgan, the American minister in Mexico, was instructed to demand "the instant release of these men;" but as to Burnato it was stated that, if the Mexican Government should bring up the fact of his "not being a citizen of the United States," the minister was to suggest that, as he had for fourteen years been a permanent resident of the United States, of which he had declared his intention to become a citizen, and had thus been under the protection of the Government, its laws, and treaties, it would "seem very ungracious" for Mexico "to insist . . . on making any unfavorable distinction in his case."<sup>a</sup>

October 27, 1880, Mr. Morgan demanded the release of the five men, describing them as "citizens of the United States."<sup>b</sup>

The Mexican Government immediately answered that the persons thus described should apply for their discharge to the judicial tribunals.<sup>c</sup>

The United States declined to accept this reply as satisfactory, at the same time making, as to Burnato, the following remark: "The peculiarities of Burnato's case are sufficiently explained in my No. 71."<sup>d</sup>

Subsequently the Mexican Government, making, after inquiry of the war office, further reply to Mr. Morgan's representations, informed him that it had been ascertained that all the men, except one who deserted, were discharged from the army in July, 1880, three months before the demand for their release was made.<sup>e</sup>

It appears that Burnato was "begged out . . . by his wife."<sup>f</sup>

The consul at Piedras Negras insisted that the men should have

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<sup>a</sup> Mr. Hunter, Act. Sec. of State, to Mr. Morgan, min. to Mexico, No. 71, Oct. 9, 1880, For. Rel. 1880, 776.

<sup>b</sup> For. Rel. 1881, 747.

<sup>c</sup> Mr. Fernandez, for Mex. ministry of for. aff., to Mr. Morgan, Oct. 30, 1880, For. Rel. 1881, 748.

<sup>d</sup> Mr. Evarts, Sec. of State, to Mr. Morgan, No. 80, Dec. 8, 1880, For. Rel. 1881, 751, 752.

<sup>e</sup> Mr. Mariscal, min. of for. aff., to Mr. Morgan, Dec. 24, 1880, For. Rel. 1881, 754. See, however, as to two of the men, *id.* 758.

<sup>f</sup> For. Rel. 1881, 758.

some indemnity. The Department of State wrote Mr. Morgan that the consul's "suggestion . . . seems to be at least worthy of consideration."<sup>a</sup>

Mr. Morgan, in reply, requested specific instructions as to Burnato, directly asking: "Is he a citizen of the United States, and therefore entitled to protection?"<sup>b</sup>

The Department of State replied: Burnato "will not be entitled to the protection of this Government without having acquired full citizenship."<sup>c</sup>

"So far as political rights are concerned, a mere declaration of intention to become a citizen of the United States would give Abdellah Saab no title to claim the intervention of the United States should he return to his native land. If, however, he is domiciled in the United States, though not naturalized, the Government of the United States would be ready to assert for him any municipal rights which by the law of nations are assigned to domicil."

Mr. Bayard, Sec. of State, to Mr. Williams, Oct. 29, 1885, 157 MS. Dom. Let. 486.

The foregoing extract is here reproduced, as it is given in Wharton's Int. Law Dig. II. 360. In the original letter, however, it is followed by a passage which practically renders nugatory what is said as to asserting "any municipal rights" belonging to "domicil." Abdellah Saab was a native of Turkey, who, having made a declaration of intention, desired to pay a "short visit" to Turkey, "without subjecting himself to the charge of thereby reviving his native allegiance." To that end he requested a passport. He was informed that he could not have one, till he had been naturalized. Then comes the passage above quoted; and then, immediately afterwards, this sentence:

"But in any view for him to return to Turkey, until his naturalization in the United States is complete, would, unless he obtain a special permit from the Turkish authorities, after reservation on his part communicated to them, lead, in international law, to the inference that he had resumed his Turkish allegiance."

J. H. da C., a native of Portugal, who had lived in New York and at one time served in the United States Navy, and who regarded himself as domiciled in New York, desired the official protection of the American consul-general at Shanghai. It was held that, although

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<sup>a</sup> For. Rel. 1881, 757.

<sup>b</sup> For. Rel. 1881, 791, 792.

<sup>c</sup> Mr. Hitt, Act. Sec. of State, to Mr. Morgan, No. 173, Sept. 14, 1881, MS. Inst. Mex. XX. 348.

he presented strong evidence of domicile in the United States, yet, as he had not become a citizen, he was "not entitled to all the rights of such a citizen, either in the United States or elsewhere;" that one of those rights was consular "protection" in countries where consuls exercised extraterritorial jurisdiction; that this meant practically the right to be registered as a citizen and to enjoy the privileges of one; and that, "for the purposes of the acts of Congress in this behalf, it is conceived that domicile and citizenship are not convertible terms, and this has been the general opinion of the Department."

Mr. Porter, Assist. Sec. of State, to Mr. Kennedy, cons. gen. at Shanghai, No. 23, Nov. 10, 1886, 119 MS. Inst. Consuls, 519.

See, also, Mr. Olney, Sec. of State, to Mr. Denby, min. to China, Jan. 13, 1897, For. Rel. 1896, 92.

"If Mr. King [a native of Canada who had 'resided in the United States on and off for a period of about ten years,' and had made a declaration of intention] should, on appealing to this Government for protection, show that he was domiciled in this country as well as an inchoate citizen, by virtue of having declared his intention, the question of granting protection would be presented for consideration. But this position does not involve the admission of Mr. King's right to a passport or special protection papers. A passport can only be granted to native or naturalized citizens, and protection papers are no longer issued by the Department."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Feb. 1, 1887, For. Rel. 1887, 287.

In May, 1887, Baron Seillière, a Frenchman, was confined in an insane asylum near Paris, in consequence, it was said, of a family controversy. He had made a declaration of intention to become a citizen of the United States, where he had, before his return to Paris, resided "about twelve months;" and on these and certain other circumstances, including the taking of a house at Newport, Rhode Island, it was affirmed that his domicile was American. With citations of the supposed position of Mr. Webster in Thrasher's case, and of Mr. Marcy in Koszta's case, as set forth in Wharton's Digest, the Department of State was urged to demand of the French Government the baron's release. A communication from Commander d'Ullmann, who had accompanied the baron to Paris, to Brother Justin, the director of Manhattan College, New York, represented the necessity of a "formal demand." A cablegram from Paris, from "Mr. Monroe Livermore, one of our wealthiest New Yorkers," read: "Spino's [the baron's] life in danger unless McLane receive formal order from Bayard to act for him as American citizen, entitled to full rights. Washburne saved in this manner during Commune many French

lives. In humanity's name help us; wire commander." By yet another correspondent Mr. Bayard was adjured, as Secretary of State, "to take counsel of Thomas F. Bayard." June 10, 1887, Mr. Bayard cabled to Mr. McLane, then American minister at Paris: "Use your personal good offices to ascertain the cause of Baron Seillière's detention and to obtain his release if possible." June 24, Mr. Bayard wrote to Mr. McLane: "It is represented to me that you are fully conversant with the facts of the case, and that you only await the instructions of the Department to make formal official demand upon the French Government for Baron Seillière's release." June 25, however, necessarily without knowledge of this statement, Mr. McLane, in writing to Mr. Bayard, said: "In my intercourse with Mr. Flourens [French minister of foreign affairs], though I did not permit my intervention to exceed the limit prescribed in your instruction, I discussed with him the question, which was very fully presented by Baron Seillière's counsel, as to whether his declared intention of becoming a naturalized citizen of the United States deprived him of his French citizenship, and Mr. Flourens did not conceal from me his decided opinion adverse to such a construction of international law. He said that the French code, in contemplating the loss of French citizenship, assumed that a new citizenship had been acquired, and I am very sure that had I been instructed to demand Seillière's release it would have been refused, and I should have been involved in a discussion of a great international question, embarrassed by the facts and circumstances of a case involving the police and health laws of this country." Mr. McLane, July 6, wrote further: "I never gave any occasion for the friends of Seillière to represent to you that I only awaited instructions to make a formal official demand upon the French Government for his release, . . . nor shall I, as at present advised, recommend any such action on your part." Mr. McLane also reported that judicial proceedings had been instituted in behalf of the baron's children to obtain his release. He was released, though not by order of court, yet under the operation of French law, July 19, 1887.

For. Rel. 1887, 303, 304, 305, 306, 308, 309, 310, 312, 313, 343, 349, 355.

Subsequently an application was made to Mr. Bayard for a certificate that the baron had made a declaration of intention; that he had permanently taken up his residence in the United States and was "domiciled" in New York; and that he had by such acts "secured the domiciliary rights and protection of the American citizen under the laws of the United States Government as to person and property, and is entitled to recover under the laws of the United States and under international law such personal and real estate as is justly and legally belonging to him in the Republic of France." In support of

this application, the Thrasher and Koszta cases were again cited, thus: "See quotations from communications of Mr. Webster, Secretary of State, and Mr. Marcy, Secretary of State; and decisions of U. S. Supreme Court, as cited in Mr. Webster's communication, 'Treatise on International Law,' Wharton, vol. 2, sec. 198."

"I have your letter of the 18th instant, in which—after quoting from my letter of the 12th instant, written in reply to your request that the Department give a certificate of domicile to Baron Seilliére according to a form which you then submitted, and my statement to you that it is not competent for this Department to give a certificate of any of the facts which are usually recognized in law as constituting the domicile of an individual—you say that you did not ask for such certificate, but that I should 'certify' that I am 'satisfied that Baron Seilliére had his domicile in the United States.'

"By referring to my letter of the 12th instant, you will find that the reason stated for my declination to execute the desired certificate was that 'no such power of certification is vested by law in this Department.'

"By act of Congress there is vested in this Department the power to issue passports to citizens of the United States. This is the only certification of national status which the Department is authorized by law and which it is its practice to make.

"The reason of this practice is obvious. The question of citizenship is a matter of fact, whether the citizenship be by birth or by naturalization. In the latter case certain legal conclusions have to be reached by inference from facts which are ascertainable only by the judicial branch, whose judgments thereon are accepted as conclusive.

"The question of domicile is a matter of inference from circumstances which are often shifting, uncertain, and complex. Such a certificate as you request would, therefore, not be a statement of fact which the Department is authorized by law to certify, but the promulgation of a judgment, which is not an executive function.

"The practice of the Department is invariable and correct in principle; it is also impartial, and applies equally to those who are and those who are not citizens of the United States. The rights of domicile and of nationality are not identical, and are often entirely distinct and independent.

"The case of Koszta has no relevance to the present question. That was the case of international controversy existing, and entertained as such by the President, in which his decision was required.

"It was not a judgment or opinion in anticipation of a case that might arise; nor did it constitute an exception to the uniform course

of this Department, which is to decline to pronounce anticipatory judgments."

Mr. Bayard, Sec. of State, to Mr. Develin, Oct. 21, 1887, For. Rel. 1887, 355. See *infra*, pp. 924-925.

Where a citizen of the United States invoked protection for a "friend" of "Scotch nationality, domiciled formerly in the United States, but now engaged in missionary work in Japan," the Department of State said: "Mere domicile in the United States does not entitle a person to claim the official protection of this Government. Should occasion arise, this Department would, however, use its good offices to aid your friend in any way which it properly could."

Mr. Uhl, Act. Sec. of State, to Mr. Tucker, Jan. 9, 1895, 200 MS. Dom. Let. 197.

Lem Moon Sing, whose exclusion from the United States as an alien Chinese laborer had been ordered by executive officers of the United States, applied for a writ of *habeas corpus*. By the statute under which the order was made, the exclusive control of the subject was committed to such officers. Lem Moon Sing sought, however, to escape the disability of alienage, and to secure, through the intervention of the courts, his readmission to the United States, on the ground that he had a "permanent domicile" in the United States, and was lawfully engaged in mercantile pursuits at San Francisco; that this domicile had never been surrendered or renounced by him; and that the purpose of his absence from the United States was merely that of "a temporary visit to his native land, with the intention of returning and continuing his residence in the United States," in the prosecution of his business. These statements were not controverted. Mr. Justice Harlan, delivering the opinion of the court, said:

"He [Lem Moon Sing] is none the less an alien because of his having a commercial domicile in this country. While he lawfully remains here he is entitled to the benefit of the guarantees of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the Government as expressed in enactments of the law-making power. He cannot, by reason merely of his domicile in the United States for purposes of business, demand that his claim to reenter this country by virtue of some statute or treaty, shall be

determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the Government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power possessed under the Constitution."

*Lem Moon Sing v. United States* (1895), 158 U. S. 538, 547-548.

The term "commercial domicile," in the foregoing extract, seems to have been employed, as it apparently was in *Lau Ow Bew v. United States*, 144 U. S. 47, 62, 63, merely as descriptive of the domicile of choice of the petitioner, who was a merchant. In both cases a domicile in the usual sense was alleged, and the admitted facts fully sustained the allegation. This circumstance seems to have been overlooked in *United States v. Chin Quong Look*, 52 Fed. Rep. 203, in citing the case of *Lau Ow Bew*. But, see *Fong Yue Ting v. United States*, 149 U. S. 698, 724.

## CHAPTER XII.

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## I. NATURE AND FUNCTIONS.

## § 492.

A passport is the accepted international evidence of nationality. In its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go, as well as lawful aid and protection.

Other documents, such as safe-conducts, letters of protection, and special passes for individuals, and even passes for vessels, are often referred to as passports, and not altogether inaccurately, since their object is to secure for the particular person or property freedom of movement and lawful protection. But these documents are used chiefly in war, and are granted on the strength of the personality rather than of the nationality of the individual, being issued, according to the circumstances of the case, even to enemies.

The Attorney-General advised, in 1866, that the Secretary of State was not authorized to furnish the owners of an American merchant vessel with a safe-conduct to the American ministers and naval officers in the East.<sup>a</sup> A special passport or protection paper was, however, issued by Mr. Blaine, in 1890, to an American vessel going on a long and hazardous voyage;<sup>b</sup> and certificates of American character are given to American-owned but foreign-built vessels.<sup>c</sup> Such papers hardly fall within the provisions of the law relating to passports. The terms of the law obviously refer to certificates of nationality issued to individuals.

The Department of State seems in early times occasionally to have issued a certificate of citizenship, neither in the form nor in the nature of a passport. Thus Mr. Pickering, Secretary of State, certified under the seal of his Department, Aug. 3, 1796, that "Ferdinand Gourdon, of the city of Philadelphia, merchant, is, and for at least nine years last past has been, a citizen of the United States of America." Again, on Aug. 13, 1796, Mr. Pickering certified that it appeared "by authentic documents now before me," that on June 22,

<sup>a</sup> Stanbery, At. Gen., 12 Op. 65.    <sup>b</sup> Supra, vol. 2, p. 1068.    <sup>c</sup> Supra, § 323.

1784, "Andreas Everardus Vanbraam Houckgeest, before that time a subject of the United Netherlands, was duly admitted and became a citizen of the State of South Carolina, pursuant to the laws of that State, and consequently, by virtue of the Articles of Confederation, a citizen of the United States;" that no subsequent act appeared to have "divested him of his citizenship;" and that he therefore "recognized" him as "a citizen of the United States of America."

9 MS. Dom. Let. 249, 265.

For the form of the first passport found in the records of the Passport Bureau of the Department of State, see Hunt's American Passport, 77.

In 1866 two persons named Albee and Gordon, claiming to be American citizens, complained that the United States consul at Buenos Ayres had refused to give them duplicates of "protection papers" to secure to them their treaty rights as citizens of the United States. The action of the consul in refusing to issue "protection papers" was approved, passports being the only "protection papers" known to the law or sanctioned by the Department of State; and it was directed that the practice of granting so-called "protection papers," which seemed to have prevailed at the consulate, should be discontinued. It was stated, however, that "the Argentine Government or its agents might reasonably be expected to grant to the claimants some form of certificate of protection or safe-conduct such as is technically known as 'protection papers.'"

Mr. Seward, Sec. of State, to Mr. Ashoth, min. to Argentine Republic, No. 27, March 27, 1867, MS. Inst. Argentine Repub. XV. 275.

In the course of this instruction, Mr. Seward said:

"Passports are the only 'protection papers' known in the law, or sanctioned by this Department. What are technically called 'protection papers' are used in our international intercourse with uncivilized nations. Protection papers are a feature in the principle of asylum, which we maintain with barbarous or semicivilized states, but nowhere else."

The passport is the only attestation of American nationality which the United States legation is authorized to give.

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, July 2, 1885, For. Rel. 1885, 373.

See, to the same effect, Mr. Adee, Act. Sec. of State, to Mr. Terres, Sept. 26, 1893, For. Rel. 1894, 346.

In reply to a request from a person for a letter to the United States minister in Germany recommending the person in question for protection in case he should return to Germany, the Department said that it never issued such a letter; that the only paper it issued to

citizens going abroad, as an evidence to foreign governments of their nationality, was a passport.

Mr. Blaine, Sec. of State, to Mr. Butterworth, March 4, 1890, 176 MS. Dom. Let. 554.

"A passport is the only paper issued by the Department for the protection of a citizen " abroad.

Mr. Foster, Sec. of State, to Mr. Clarke, M. C., Dec. 20, 1892, 189 MS. Dom. Let. 500.

"Passports are issued by this Department to naturalized citizens upon the production of the certificate of naturalization. There is no law of the United States requiring a passport to state when a naturalized citizen left the country of his birth, or to embody that statement in the passport. It has not been the practice of this Department to insert such a statement in the passports issued to former Turkish subjects or to any other naturalized citizens. A different course might imply that the right of the foreign government to participate in or to make the naturalization of its subjects conditional was acknowledged here. This it has never been and probably never will be."

Mr. Bayard, Sec. of State, to Mr. Emmet, May 20, 1885, For. Rel. 1885, 847.

"There is neither law nor regulation in the United States requiring those who resort to its territories to produce passports. Since the foundation of the Government such documents have never been required save in time of war, and resort to this restriction upon the freedom of travel was happily not found to be necessary during the recent hostilities with Spain. Neither is the production of a passport as evidence of identity or civil condition a requisite to residence in any of the several States of the Union.

"The certificates issued to Chinese subjects coming to the United States are hardly an exception to this rule, being in the nature of certificates of identity and of individual right to enter the United States under the privileges granted by treaty between the United States and China to certain classes of Chinamen."

Mr. Adee, Act. Sec. of State, to Sir J. Pauncefote, Brit. min., No. 1194, Sept. 22, 1898, 24 MS. Notes to Brit. Leg. 329.

"It has been determined to inaugurate a new system by which no American citizen of foreign birth shall receive passports without being informed of those general provisions of law of the land of his birth which it is important for him to know before he returns to it.

He will therefore receive with his passport a brief and easily comprehended statement applicable to his case."

Mr. Hay, Sec. of State, to Mr. Herdliska, chargé at Vienna, Dec. 10, 1900, MS. Inst. Austria, IV. 543.

For the statements applicable to the various countries, see For. Rel. 1901, under the proper heads.

See, also, the chapter on Nationality, title Expatriation, *supra*, § 431 et seq.

"As a means of controlling individuals, the efficacy of passports is questionable, for little or no impediment can exist to their procurement, either in a regular way upon proof of citizenship, or by subterfuge, by the few to whom precautionary measures might apply and who are interested in avoiding them, while upon the mass of honest travelers they impose an expensive and useless burden. Admitting that passports may serve as a check in certain cases, their usefulness in this sense is more than counterbalanced by the international considerations attaching to such documents. Passports are *prima facie* evidence of the individual's right as a citizen to the protection of the Government which issues them, and a special responsibility rests upon the Government that disregards such evidence. . . . The modern systems of travel, moreover, are on definite and regular lines of communication. Individuals traveling by separate conveyance from one country to another are rarely encountered, and to them the conditions of the passport system do not apply. By the aid of the electric telegraph instant notice can be given of anything like the formation of a hostile expedition, or even of the embarkation of a single dangerous individual."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Span. min., May 19, 1886, MS. Notes to Spain, X. 420.

"Requiring on their part no such documentary evidence from persons landing in the United States from Spain or any of the Spanish dependencies, the United States cannot view the exaction of passports by Spain in the light of reciprocity; but, on the contrary, as a positive discrimination against their citizens, inasmuch as no passports are required in the Antilles of passengers from Europe or the British possessions in North America. . . .

"No interference is intended with the option of the individuals in providing himself with any convenient means of establishing his citizenship and identity. In the event of proof of American citizenship becoming necessary, proper identification can be made, or a passport issued whenever specially required. I draw a distinction between the right of the citizen to obtain from his government evidence of correlative allegiance and protection and the exaction by a foreign govern-

ment of such evidence in respect only of the citizens or subjects of a particular country."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Span. min., May 19, 1886, MS. Notes to Spain, X. 420.

See, also, Mr. Bayard, Sec. of State, to Mr. Foster, min. to Spain, No. 336, May 6, 1885, For. Rel. 1885, 711; Mr. Foster to Mr. Bayard, No. 334, June 30, 1885, id. 726; Mr. Bayard to Mr. Foster, No. 390, Aug. 21, 1885, id. 751.

"The question of national discrimination is broadly involved, and I do not understand Señor Muruaga's declaration as meeting the disfavor shown by demanding from travelers leaving the United States passports which are not required in the case of persons going to Cuba from other countries. My recent note to the Spanish minister has intimated the indisposition to accept as a reason for such discrimination the suggestion he appeared to imply, that residents in the United States are, more than in other countries, a source of peril to peace and order in the Antilles. This Government, of course, objects to any discrimination, no matter in what manner expressed, against its citizens."

Mr. Bayard, Sec. of State, to Mr. Curry, June 14, 1886, MS. Inst. to Spain, XX. 230.

"A recent dispatch from the United States consul-general at Havana communicates to me a number of letters addressed to him by American citizens who, having entered the island without the production of a passport being required as a condition of landing, have suffered considerable delay and some expense through the exaction of a passport as a condition of being permitted to quit the island. This rule appears to be enforced even when the passenger is merely in transit and transferred from one vessel to another for the purpose of making the continuous voyage between ports of the United States and Mexico. In nearly every instance the writers state that they had made inquiry at the United States port of sailing, and had been there informed that no passport was needed by them upon landing in Cuba, and that a permit to depart could be obtained through the consul of the United States, at a trifling cost, said in several of the letters to be 30 cents. The consul-general, however, reports the charge to be 30 cents for visé of a passport, and \$4.05 for the issuance of a permit of departure when the party is unprovided with a passport. . . . I fail to see the justice of imposing restrictions and burdens upon the departure of American citizens from the island which are not imposed upon their landing, and I should be glad to hear that a more uniform and conspicuously rational rule has been adopted. May I trust that, in the interest of the large and mutually beneficial inter-

course between the United States and the Antilles, you will use your good endeavors toward a change in this regard? "

Mr. Bayard, Sec. of State, to Mr. Muruaga, Span. min., April 11, 1887, For. Rel. 1887, 1029.

See, as to the complaints referred to, Mr. Bayard, Sec. of State, to Mr. Curry, min to Spain, No. 141, Nov. 23, 1886, For. Rel. 1887, 975; same to same, No. 180, March 18, 1887, id. 985; same to same, No. 181, March 21, 1887, id. 991; Mr. Adey, Act. Sec. of State, to Mr. Curry, No. 185, April 16, 1887, id. 994; Mr. Bayard to Mr. Curry, No. 187, April 25, 1887, id. 995; Mr. Bayard to Mr. Strobel, chargé at Madrid, No. 228, Oct. 20, 1887, id. 999; Mr. Strobel to Mr. Bayard, No. 271, Nov. 2, 1887, id. 1002.

"It appears from explanations forwarded to me by the captain-general of Cuba in reference to passports, that these are not required from foreigners during a month's travel. Beyond this time, according to the alien law, they must provide themselves with a passport. This is more or less a measure of internal policy. In the first case they are considered under the law as transients, in the second as residents.

"Against this I have already remonstrated in Madrid, but to avoid in the meantime all source of trouble, I deem it necessary to instruct all our consuls in the United States to furnish a visé to American citizens going to Cuba at a cost of \$1."

Mr. Muruaga, Span. min., to Mr. Bayard, Sec. of State, June 10, 1887, For. Rel. 1887, 1030.

"The requirement of a passport or permit to quit a country is common and is enforced at the present time by important states, such as Russia, Turkey, and Spain in the Spanish Antilles. The right to prescribe such a formality can not well be disputed, but the amount of the fee (6 gourds) may warrant friendly representations against so onerous a charge."

Mr. Sherman, Sec. of State, to Mr. Powell, min. to Hayti, Oct. 23, 1897, For. Rel. 1897, 343, referring to a proposed law requiring all persons leaving Haytian ports to provide themselves with passports.

See, also, Mr. Uhl, Act. Sec. of State, to Mr. Terres, No. 57, Aug. 24, 1894, MS. Inst. Hayti, IIL 407.

"No passports are necessary for the entrance into Cuba and Porto Rico of passengers from Spain or elsewhere." (Mr. Hay, Sec. of State, to Sir J. Pauncefote, Br. amb., Jan. 21, 1899, For. Rel. 1899, 338.)

## II. AUTHORITY TO ISSUE.

## 1. IN THE UNITED STATES.

## § 493.

Down to the act of Aug. 18, 1856, the issuance of passports was not regulated by law. While they were granted by the Secretary of State, in the exercise of his proper functions, papers designed to serve the same purpose were issued by the governors of States and other local authorities, and even by notaries public. The practice of the Department of State itself in such matters was, however, exceedingly loose. Passports were on occasion sent out to a collector of customs or other official, with instructions to hand them over, on "satisfying" himself that the applicants were citizens of the United States.<sup>a</sup>

Complaints of the Mexican Government that passports were fraudulently obtained led to the adoption of special precautions in regard to persons who claimed American citizenship by virtue of residence in Louisiana at the time of its cession to the United States.<sup>b</sup>

The first step taken toward preventing the issuance of passports in the United States by local authorities appears to have been due to the refusal of foreign governments and their representatives to recognize such documents. The Department of State issued a notice calling attention to the facts.

"Your letter of the 15th instant has been received. The notice from this Department in relation to passports, which is referred to by you, was not issued in consequence of any arrangements with foreign governments, nor was it founded on any information having particular reference to passports given by the executive of Massachusetts.

"It is within the knowledge of the Department that the diplomatic agents of foreign governments in the United States have declined authenticating acts of governors or other State or local authorities; and foreign officers abroad usually require that passports granted by such authorities shall be authenticated by the ministers or consuls of the United States. Those functionaries, being thus called upon, find themselves embarrassed between their desire to accommodate their

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<sup>a</sup> Mr. Brent to Mr. Swartwout, collector at New York, April 24, 1832, 25 MS. Dom. Let. 79; Mr. Forsyth, Sec. of State, to Mr. Swartwout, May 13, 1836, 28 id. 315.

<sup>b</sup> Mr. Livingston, Sec. of State, to Gov. Roman, of La., Aug. 16, 1831, 24 MS. Dom. Let. 201; Mr. Brent, chief clerk, to Mr. Hurst, Feb. 11, 1832, 25 id. 15; Mr. Brent to Lieut. R. B. Lee, April 20, 1833, id. 293.

fellow-citizens and their unwillingness to certify what they do not officially know; and the necessity of some uniform practice, which may remove the difficulties on all sides, has been strongly urged upon the Department.

“With the practice of Massachusetts in issuing certificates of citizenship to citizens of that Commonwealth going abroad, this Department has no concern. If those documents have answered all the purposes of passports in all parts of the civilized world, it was, probably, owing to their having been authenticated by a minister or consul of the United States, more especially in countries where vigilance is exercised in regard to the introduction of foreigners. The notice has no other object than the convenience of those concerned.”

Mr. Forsyth, Sec. of State, to Mr. Bangs, Sec. of the Commonwealth of Mass., April 21, 1835, 28 MS. Dom. Let. 1.

Early in 1854 Mr. Marcy, as Secretary of State, complained of the action of a notary public in New York City in issuing certificates which were designed to serve as passports and which had in some instances served that purpose. “You have erred,” said Mr. Marcy, “in stating to persons, as you say you have done, that no passports are issued in America, but only certificates of citizenship by the State Department. Although the passport of this Department is substantially only a certificate of citizenship, still it is a passport, and believed to be almost identical in form with that issued by other governments. The head of this Department is the only officer in the United States who can be recognized by the authorities of foreign governments.”

Mr. Marcy, Sec. of State, to Mr. Nones, April 14, 1854, 42 MS. Dom. Let. 363.

See, also, Mr. Marcy to Gov. Clark, April 2, 1855, 43 MS. Dom. Let. 473; to Mr. Nones, April 11, 1854, 42 *id.* 354.

“To preserve proper respect for our passports it will be necessary to guard against frauds as far as possible in procuring them. I regret to say that local magistrates or persons pretending to have authority to issue passports have imposed upon persons who go abroad with these spurious papers. Others, again, who know that they are not entitled to passports—not being citizens of the United States—seek to get these fraudulent passports, thinking that they will protect them while abroad.”

Mr. Marcy, Sec. of State, to Mr. Fay, min. to Switz., Oct. 4, 1854, MS. Inst. Switz. I. 20.

“The object of this communication is to apprise you that the diplomatic and other agents of the United States abroad were in-



structed not to acknowledge passports or certificates of citizenship other than those issued from this Department."

Mr. Marcy, Sec. of State, to Mr. Horr, mayor of St. Louis, Feb. 5, 1855, 43 MS. Dom. Let. 365.

The act of August 18, 1856, 11 Stat. 60, as embodied in the Revised Statutes of the United States, § 4075, provides that "the Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States."

The same act (§ 4078 R. S.) forbids under penalty "any person acting, or claiming to act, in any office or capacity, under the United States or any of the States of the United States, who shall not be lawfully authorized so to do," to "grant, issue, or verify any passport or other instrument in the nature of a passport, to or for any citizen of the United States, or to or for any person claiming to be or designated as such, in such passport or verification."

See Mr. Fish, Sec. of State, circular No. 16, Jan. 10, 1872, MS. Inst. Arg. Rep. XVI. 1.

The inhibition extends to officials in the United States as well as abroad, and to State as well as Federal officials (Black, At-Gen., 1859, 9 Op. 350.)

See, also, Mr. Fish, Sec. of State, to Mr. Coke, March 23, 1875, 107 MS. Dom. Let. 229; to Mr. Kellogg, June 5, 1875, 108 id. 373.

Mr. Frelinghuysen, Sec. of State, to Mr. Brewster, Feb. 12, 1884, 149 MS. Dom. Let. 665; to Mr. Alvarez, Jan. 9, 1885, 153 id. 610.

Mr. Davis, Assist. Sec. of State, to Mr. Speakman, Dec. 18, 1884, 153 MS. Dom. Let. 464.

By the act of June 14, 1902, § 4075 is amended by inserting, after the phrase "consular officers of the United States," the words "and by such chief or other executive officer of the insular possessions of the United States;" and, by the same act, § 4078 is amended by extending the penalty therein prescribed to any person who, while acting or claiming to act "under the United States, its possessions, or any of the States," performs the prohibited act to or for "any person not owing allegiance, whether citizen or not, to the United States." (32 Stat., part 1, p. 386.) This last phrase is obviously designed to embrace the native inhabitants of Porto Rico and the Philippines, whose status has been defined by Congress as that of "citizens of Porto Rico" and "citizens of the Philippine Islands," respectively, and who are declared to be entitled to passports as such. See *supra*, § 379, and *infra*, § 496.

A "certificate of identity," issued by a notary to a person about to travel abroad, is a paper in the nature of a passport, and its issuance is an infraction of the statute.

Mr. Evarts, Sec. of State, to the governor of New York, June 8, 1877, 118 MS. Dom. Let. 516.

"Certificates of identification," which were issued by the mayor of New Orleans to persons going abroad, and which, whatever the purpose they may have been intended to serve, were on various occasions presented and used as passports, were considered to fall within the inhibition of the statute, and the mayor was requested to discontinue the issuance of them.

Mr. Hill, Assist. Sec. of State, to the mayor of New Orleans, Dec. 5, 1899, 241 MS. Dom. Let. 429.

"The passport provided by this Department is a certificate of citizenship for identification and protection of an American citizen who is about to visit a foreign country. The paper submitted by you is a certificate of citizenship for exactly the same purpose. Aside from the fact that, being to all intents and purposes a passport, it cannot be lawfully issued by you, it is very objectionable in some of its declarations. No person other than a chief officer of this Department can with propriety certify officially that the bearer of the certificate has fully and satisfactorily 'complied with the requirements established by the Department of State of the United States, to entitle said bearer to a United States passport.'"

Mr. Bayard, Sec. of State, to Mr. Conoly, Feb. 24, 1886, 159 MS. Dom. Let. 147.

In 1889 the attention of the Department of State was called by some of its agents abroad to a certificate which certain persons had sought to use as passports. The certificate, which was signed by the governor of Minnesota and bore the seal of that State, set forth that the bearer was "a worthy and respected citizen" of Minnesota and that he was "about leaving home to travel in Europe," and bespoke for him "the kind attention of all to whom these presents may come." Mr. Blaine, as Secretary of State, submitted the matter to the governor of Minnesota, and called attention to secs. 4075, 4078, R. S. It seems that it had been the custom for many years to issue such papers, but the practice was discontinued.

For. Rel. 1890, 330, 332, 335.

The certificate of a governor, under the seal of the State, recommending a person's private enterprise, but not representing him to be a citizen of the United States, is not a paper in the nature of a passport. (Mr. Wharton, Act. Sec. of State, to Mr. Lincoln, min. to England, No. 466, March 24, 1891, MS, Inst. Gr. Br., XXIX. 435.)

A certificate and affidavit issued by a consul of the United States in Germany to citizens of the United States about to marry in Germany, as to their citizenship, is not a passport.

Mr. Evarts, Sec. of State, to Mr. Everett, chargé at Berlin, Apr. 26, 1878, MS. Inst. Germany, XVI. 383.

The statutory prohibition against the issuance of any paper in the nature of a passport applies only to persons claiming to act in some office or capacity under the United States or one of the several States, and therefore does not inhibit a foreign consul in the United States from granting to an American citizen a safe-conduct for use in the consul's country. As such a paper might, however, be regarded by the authorities of the foreign country as an attestation of the bearer's citizenship and therefore as a "passport," it is desirable that a safe-conduct or equivalent certification should be endorsed on the citizen's national passport instead of being given as an independent document.

Mr. Hill, Act. Sec. of State, to Mr. Terres, No. 373, Sept. 29, 1899, MS. Inst. Hayti, IV. 187.

"On all passports issued by Mr. Gresham the signature was stamped. This was also the case with passports issued during the terms of Secretaries Seward, Evarts, Blaine, Foster, and Olney, and is the custom at the present time. On passports issued by Secretaries Fish and Bayard the signature was in writing."

Mr. Sherman, Sec. of State, to Mr. Storer, mln. to Belgium, Sept. 18, 1897, For. Rel. 1897, 27, 28.

"Application for a passport by a person in one of the insular possessions of the United States should be made to the chief Executive of such possession.

"The evidence required of a person making application abroad or in an insular possession of the United States is the same as that required of an applicant in the United States."

Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903.

See, *supra*, the reference to the act of June 14, 1902.

## 2. IN FOREIGN COUNTRIES.

### § 494.

In the early days of the Government, consuls of the United States appear to have been in the habit of granting passports or certificates of citizenship on their own responsibility. Thus, in a note to Mr. King, American minister at London, of November 3, 1796, Lord Grenville said: "The consuls of the United States, residing in His

Majesty's dominions, have, for sometime past, been in the habit of granting to seafaring persons, certificates under their consular seal, purporting that the bearers of them are citizens of the United States, and as such liable to be called upon for the service of their own country, and that they are therefore not to be interrupted or molested by any persons whatever. I have reason to believe that these certificates have frequently been granted on very slight and insufficient evidence, and in a great number of cases to persons who were in fact British seamen. But, independently of this abuse, I am under the necessity of representing to you, on the part of His Majesty's Government, the insuperable objections which apply to the principle of a jurisdiction in this respect, assumed and exercised within His Majesty's dominions by the consuls of a foreign nation." In a letter to the American consuls in England, Mr. King, on November 18, said: "I am at present inclined to believe that the administration of oaths by our consuls, in these or any other cases, to British subjects, is neither necessary nor proper. . . . I would not be understood as giving a settled opinion on this point. I ought not to omit observing to you that neither our laws respecting consuls, nor the late law for the relief and protection of American seamen, give to our consuls any authority to grant certificates of citizenship, and I have seen no instruction from the Executive that authorizes it." Mr. King, on December 10, 1796, wrote to the Department: "I do not consider myself authorized to instruct our consuls in this or in any other instance."

Am. State Papers, For. Rel. II. 146, 147.

See, further, Lord Grenville's note to Mr. King, Mar. 27, 1797, *id.* 148.

"The eighth section of the act of Feb. 28, 1803 (2 Stat. 205), provided that if any consul, vice-consul, commercial agent, or vice-commercial agent should knowingly issue a passport or other paper to an alien, certifying him to be a citizen of the United States, he should be punished by a fine not to exceed one thousand dollars. The General Instructions to the Consuls and Commercial Agents of the United States, published in 1855, added to this the penalty of deprivation of office. . . .

"Until the act of 1856 prohibited a consular officer from issuing a passport in a country where there was a diplomatic agent, except during the latter's absence, passports were granted by consuls as a regular part of their duties; but June 1, 1853, Secretary Marcy issued a circular ordering that whenever there was a legation and consulate in the same place, the former only should issue passports. . . .

"From 1856, till the consular regulations now in force went into effect in 1896, a consul-general or, in his absence, a consul had au-

thority to issue passports in colonies; but the regulations of 1896 prohibited, generally, consular officers from issuing passports, unless specifically authorized so to do by the Department [of State], this prohibition not, however, extending to the issuing of passports by a consular officer during the temporary absence from a country of the diplomatic representative. More than forty consular officers now have the specific authority required by the regulations."

Hunt's American Passport (1898), 85-88.

As is hereafter shown in this chapter, consuls were authorized to countersign or visé passports during the Civil War; and by instruction No. 421, Feb. 12, 1865, the consul at Liverpool was authorized to issue passports. (Mr. Hunter, Act. Sec. of State, to Mr. Adams, min. to England, No. 1408, May 16, 1865, MS. Inst. Gr. Br. XX. 200.)

As to the issuance of passports by consuls in China, see *infra*, § 531.

For early forms of passports issued by ministers and consuls, see Hunt's Am. Passport, 82-85.

In March, 1894, a passport was issued by the United States legation in Berlin to a citizen of the United States temporarily residing in Luxemburg, on an application made through the American vice-commercial agent, the only American consular officer there. The legation, in reporting its action, drew attention to the fact that Luxemburg was not a part of the German Empire, as well as to the fact that there was no United States official in Luxemburg who, under the regulations, was competent to issue a passport. The Department of State replied that no question of territorial jurisdiction was necessarily involved in the case, and that, where there was no United States representative competent to issue a passport in a small state, the nearest embassy or legation might be applied to; thus, an application from Monaco might be made to Paris or to Rome, or from Andorra to Madrid or Paris. It was pointed out, however, that the commercial agent at Luxemburg had authority to issue a passport, since the statutes provide for the issuance of passports in foreign countries by consular officers, and commercial agents are, by section 1674 of the Revised Statutes, declared to be full consular officers.

Mr. Uhl, Acting Sec. of State, to Mr. Runyon, ambassador at Berlin, April 3, 1894, For. Rel. 1894, 244, 245.

It seems to have been from the beginning the recognized rule of the Department of State to decline to issue passports to persons abroad. Thus, in 1810, an application signed by Judge Tucker, of the court of appeals of Virginia, for a passport for a Mr. Carter, was sent to the American minister in Paris, with a letter reading as follows:

"As it is contrary, however, to usage to send passports from this

Department to gentlemen who are abroad, I take the liberty of forwarding this paper to you and of requesting that you will furnish Mr. Carter with every document necessary to prove his citizenship. And in addition to these, perhaps, it may be well to put him in possession of this letter, for his friends, who are of the highest respectability in this country, are extremely anxious to guard him against every risk of detention on his return to them."

Mr. Smith, Sec. of State, to Gen. Armstrong, Jan. 27, 1810, MS. Inst. U. States Ministers, VII. 88.

"A person who is entitled to receive a passport if temporarily abroad should apply to the diplomatic representative of the United States in the country where he happens to be; or, in the absence of a diplomatic representative, to the consul-general of the United States; or, in the absence of both, to the consul of the United States."

Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903.

The rule above quoted is "of long standing." (Mr. Hill, Assist. Sec. of State, to Mr. Clarke, Nov. 4, 1898, For. Rel. 1899, 88.)

See, also, Mr. Olney, Sec. of State, to Mr. Vest, Jan. 4, 1896, 207 MS. Dom. Let. 21.

The statements necessary to obtain a passport may be made before the nearest American consular officer. (Rules, Sept. 12, 1903.)

See, in this relation, Mr. Cadwalader, Assist. Sec. of State, to U. S. consuls, circular No. 1, March 1, 1875, MS. Circulars, II. 32.

### III. TO WHOM ISSUED.

#### 1. ISSUANCE FORBIDDEN TO ANY BUT CITIZENS.

#### § 495.

As the passport issued by the United States is primarily a certificate of citizenship, it has been regularly granted, except from 1863 to 1866, only to citizens. But, as to the inhabitants of the "possessions" of the United States, see *infra*, § 496.

"In order . . . that you may be furnished with passports for Mrs. Susannah Smith (your mother-in-law), your wife, and two children, it will be necessary that you send us proof of your own and of the citizenship of the first-mentioned lady."

Mr. Daniel Brent, acting chief clerk, to Mr. Latour, Aug. 14, 1804, 14 MS. Dom. Let. 353.

"The proof of citizenship which accompanied that [passport] application is not deemed satisfactory." (Mr. Brent to Mr. Cooper, Feb. 23, 1832, 25 MS. Dom. Let. 29.)

A "record or list" should be "kept of all those [passports] which you may deliver, containing the name and voucher of American citizenship of the persons to whom they are given."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, No. 2, April 28, 1823, MS. Inst. U. States Ministers, IX. 175.

"Satisfactory evidence of citizenship is necessary before he can be furnished with a passport." (Mr. Dickins, Act. Sec. of State, to Mr. Williams, Aug. 6, 1836, 28 MS. Dom. Let. 397.)

"Passports are only granted to citizens of the United States."

Mr. Forsyth, Sec. of State, to Mr. McKennan, M. C., Feb. 7, 1837, 29 MS. Dom. Let. 7.

"Applicants for passports are required to furnish this Department with proof of citizenship."

Mr. Webster, Sec. of State, to Mr. Patterson, Feb. 10, 1843, 33 MS. Dom. Let. 71.

"All applications for passports must be accompanied by evidence of citizenship."

Mr. Buchanan, Sec. of State, to Mr. Wickens, Oct. 16, 1845, 35 MS. Dom. Let. 291.

"A passport is in its terms a certificate of citizenship, and can not, consequently, with propriety be given to any person not a citizen. Mr. Davis, in his report to you in Lemmi's case, alludes to the passports which were given by Mr. Brown, at Rome, to Italians desirous of escaping after the downfall of the government of Mazzini and his colleagues. Similar passports were given at Constantinople by the American legation to the Hungarian refugees. In these last cases the words 'citizen of the United States' were erased from the passports, but Mr. Davis is not quite sure that the consul at Rome was always equally exact. If he was not, he certainly committed a great error, although no doubt with good intentions. The value of the passport to those entitled to it would soon sink if it were understood that in cases of emergency it could be obtained by those who are not entitled to it. Besides, [there is] the very grave objection that if a passport containing the words 'citizen of the United States' is intentionally given to a person not a citizen, the signature and seal of the representative of the Government are appended to what is known not to be true.

"The objection is but partly met by the erasure of the words. Police officers on the Continent seldom understand our language, and they form an opinion of the character of the document by the emblems on the vignette and the seal. If these cease to be reliable indications, they will in the same degree cease to be of value to those who are

entitled to them, and passports will be subjected to a closer scrutiny, with all the inconveniences of detention till their precise character is ascertained."

Mr. Everett, Sec. of State, to Mr. Ingersoll, min. to England, Dec. 7, 1852,  
MS. Inst. Gr. Brit. XVI. 178.

"The passport issued by this Department is a certificate that the bearer thereof is a citizen of the United States, and is issued upon proof, if the applicant was born abroad, as in the case of Mr. Kaiser, that he has been duly admitted to citizenship.

"The paper enclosed as evidence of citizenship appears to be a certificate from one of the judges of the court of common pleas of South Carolina that Mr. Kaiser has sworn allegiance to that State, in order that he may hold real estate, vote, &c., within the State; but no evidence appears that he has been admitted a citizen of the United States, and consequently he is not entitled to a passport certifying him as such."

Mr. Marcy, Sec. of State, to Mr. Wallace, Nov. 3, 1853, 42 MS. Dom. Let.  
40.

By the act of Aug. 18, 1856, it was expressly forbidden to issue a passport to any person not a citizen of the United States.

Rev. Stats. § 4076.

A person who has only made a declaration of intention can not legally obtain a passport. (Rules, Sept. 12, 1903.)

By the act of March 3, 1863, aliens who had made a declaration of intention, and who were, under specified conditions, liable to military duty, were permitted to obtain passports; but this privilege was repealed by the act of May 30, 1866.

12 Stat. 731, 754; 14 Stat. 54.

See *infra*, p. 1018; and Mr. Bayard, Sec. of State, to Mr. Stein, Aug. 28, 1888, 169 MS. Dom. Let. 503.

"Your dispatch of June 29, No. 322, has been received. If the minister of Switzerland, residing at Paris, had been informed of all the facts bearing on the question which he has raised, I cannot believe that he would have thought it necessary to offer objections against the President's proclamation concerning the liability of emigrants in the United States to perform military service.

"The Federal Constitution authorizes Congress to adopt uniform rules of naturalization, and Congress, heretofore, prescribed the conditions of five years' residence, a preliminary declaration of intention



to become a citizen, and a subsequent oath of renunciation of the native allegiance and acceptance of the new one.

“But, on the other hand, the Federal Constitution recognizes a citizenship of each State, and declares that the citizens of one State shall enjoy the right of citizenship in every other State, and leaves it to each State to prescribe the conditions of its own proper citizenship. By the constitutions of several of the States, especially the new ones, the preliminary declaration of intention, above mentioned, entitles the maker of it to all the rights of citizenship in that State, and they freely enjoy and exercise those rights. They enjoy ample protection and exercise suffrage. It was with reference to this state of facts that Congress passed the law which is recited in the President’s proclamation. And they passed another act, which authorized the Secretary of State to extend the protection of the Government to all persons who, by any laws of the United States, are bound to render military service. The two laws seem to this Government to be reasonable and just, and they constitute a new, additional, and uniform law of Federal naturalization. But it was foreseen that some emigrants, who had declared their intention, might complain of surprise if they were immediately subjected to conscription. To guard against this surprise the proclamation was issued, giving them ample notice of the change of the law, with the alternative of removal from the country if they should prefer removal to remaining here on the footing on which Congress had brought them. Surely no foreigner has a right to be naturalized and remain here, in a time of public danger, and enjoy the protection of the Government, without submitting to general requirements needful for his own security. The law is constitutional, and the persons subjected to it are no longer foreigners, but citizens of the United States. The law has been acquiesced in by other foreign powers, and I am sure that Switzerland cannot be disposed to stand alone in her protest against it.”

Mr. Seward, Sec. of State, to Mr. Dayton, July 20, 1863, *Dip. Cor.* 1863, I. 684. See *infra*, § 548.

It will be observed that the purport of this paper is that the persons in question, by virtue of the legislation cited, were naturalized citizens of the United States. See, however, *supra*, § 378.

“The only method in which this Government pledges its protection to those entitled thereto is by the issuing of a passport, and this is expressly prohibited by law except to citizens native born or duly naturalized.”

Mr. Fish, Sec. of State, to Mr. Gonzales, Sept. 7, 1869, 82 *MS. Dom. Let.* 46.

See also Mr. F. W. Seward, Assist. Sec. of State, to Mr. Claussenius, Dec. 11, 1865, 71 *MS. Dom. Let.* 287.

The laws of the United States authorize the issue of passports to all citizens thereof, without distinction, whether native born or naturalized.

Taft, At. Gen., 1876, 15 Op. 114.

As the naturalization of Chinese prior to 1882 was unauthorized, and since that time has been expressly forbidden, passports can not be issued to them as naturalized citizens, even where courts have assumed to admit them to citizenship and have granted them certificates of naturalization.

Mr. Wharton, Assist. Sec. of State, to Mr. Marshall. April 30, 1891, 181 MS. Dom. Let. 568; Mr. Foster, Sec. of State, to Mr. Holand, Feb. 10, 1893, 190 MS. Dom. Let. 284.

For further precedents, see *supra*, § 383.

As to Japanese, see *supra*, § 383; and Mr. Hay, Sec. of State, to Mr. Choate, amb. to Gr. Br., No. 415, July 10, 1900, referring to a passport issued by the embassy to a naturalized citizen of Japanese origin, and, after citing *In re Salto*, 62 Fed. Rep. 126, saying: "I am not aware that any other case involving the eligibility of Japanese to be naturalized has come before the courts." (MS. Inst. Gr. Br. XXXIII. 438.)

Louis Vonkey applied to the American legation at Athens for the renewal of a passport which appeared to have been issued to him unadvisedly by the legation at Constantinople. A Hungarian by birth, he produced no evidence of his naturalization in the United States, but showed that he had held a commission in the volunteer army, "and," said Mr. Seward, "it may be assumed can show an honorable discharge. These facts, however, do not constitute him a citizen, but only dispense, on his application to be admitted as a citizen, with the necessity of proving more than one year's residence. (12 Stats. 597, § 21.) The issuing of passports, as you are aware, is restricted to those who are citizens duly admitted by a competent court or nations [natives], and they can not be issued to those who are only entitled to become citizens but have not had their title established by judicial record."

Mr. Seward, Sec. of State, to Mr. Tuckerman, min. to Greece, Jan. 28, 1869, MS. Inst. Greece, I. 14.

Mr. Seward had in 1864 refused to issue a passport to Vonkey (or Vonoky). (Mr. Seward, Sec. of State, to Mr. Driggs, M. C., Feb. 26, 1864, 63 MS. Dom. Let. 305.)

A soldier in the United States Army, a German by birth, who has not been naturalized in the United States, "is not entitled to a passport and can only return to his native country at the risk of being subjected to service in the German army on his arrival there."

Mr. Bayard, Sec. of State, to Mr. Endicott, Sec. of War, Feb. 23, 1887, 163 MS. Dom. Let. 215.

"Protections to seamen are not included under the denomination of passports, nor are they ever granted by public ministers. Seamen may, nevertheless, like other citizens, occasionally want the passport of the minister and are equally entitled to it."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, No. 2, April 28, 1823, MS. Inst. U. States Ministers, IX. 175.

"It appears from Mr. Wolff's affidavit that he was born in Silesia, July 9, 1859, and came to this country in 1878; that he served from 1884 to 1892 on board the United States coasting ships, and during the late war with Spain on board the United States ship *San Francisco*, as shown by his discharge paper. He also exhibited a declaration of intention to become a citizen of the United States.

"From the statement submitted it would appear a passport should not have been issued in this case. Service as a seaman or in the naval service of the United States does not in itself confer citizenship. It has never been held by the Department that one who has been an American seaman and has made his declaration of intention to become an American citizen is entitled to receive a citizen's passport until he has complied with the requirements of section 2174 of the Revised Statutes and received naturalization papers from a court having competent jurisdiction. Honorable discharge from an enlistment in the Navy after five years' service is also a cause for naturalization by the courts under the provisions of the act approved July 26, 1894 (vol. 28, United States Statutes at Large, p. 124), but the discharge by itself confers no rights of citizenship."

Mr. Hay, Sec. of State, to Mr. White, amb. to Germany, Jan. 27, 1899, For Rel. 1899, 296.

Passports can not be issued, as a "favor," to persons not legally entitled to them.

Mr. Hay, Sec. of State, to Mr. Hardy, min. to Switz., No. 11, June 7, 1901, MS. Inst. Switz. III. 263.

## 2. INHABITANTS OF ANNEXED, OR OCCUPIED, TERRITORY.

### § 496.

Pending the occupation of Cuba by the United States, and pending legislation by Congress to determine the civil rights and political status of the native inhabitants of the territory ceded to the United States by the treaty of peace with Spain of Dec. 10, 1898, the diplomatic and consular officers of the United States, while authorized to register as such, in their offices, native inhabitants of Cuba and Porto Rico temporarily sojourning abroad, were instructed that they were not authorized to issue to persons so registered any certificate or other

paper having constructively the effect of a passport; but that, if the applicant possessed evidence of his native status, such as a personal certificate of matriculation, commonly called "*cédula de vecindad*," or other proof of recent date, they might endorse upon it, "Noted in the legation" (or consulate, as the case might be) "of the United States at —," attaching the signature and date and affixing the official seal.

Mr. Hay, Sec. of State, to the diplomatic and consular officers of the United States, circular, May 2, 1899, For. Rel. 1900, 894, 895.

Mr. Storer, United States minister at Madrid, Oct. 22, 1900, stated that an *alcalde* in Porto Rico had issued a joint passport to a husband, wife, and minor children as citizens of Porto Rico, United States of America, and that the husband, who was about to visit Cuba, would be obliged to carry the passport with him. He asked what sort of an official certificate should be given by the United States consul-general at Barcelona to the family, who would remain there.

Mr. Storer was instructed that the consul-general might certify a copy of the Porto Rican paper, and if necessary *visé* it. (Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, tel., Oct. 24, 1900, For. Rel. 1900, 892.)

Mr. Storer subsequently stated that the civil provincial governors in Cuba and the municipal authorities in Porto Rico issued in lieu of *cedulas* papers of different forms and wording, purporting to be passports, which were presented for registration and *visé*. He inquired as to what officers were authorized to issue passports and in what form.

Mr. Hay replied: "All passports or *cedulas* presented by citizens of Porto Rico and Cuba, and all passports or *cedulas* presented by natives of the Philippines, when issued or countersigned by the military authorities of the United States in these islands, shall be registered and *visé*ed." (Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, tel., Nov. 6, 1900, For. Rel. 1900, 893.)

Mr. Storer, in his No. 363, Dec. 20, 1900 (For. Rel. 1901, 457), acknowledged the receipt of Department's No. 244, of Nov. 9, 1900 (For. Rel. 1900, 893), and discussed the circular of May 2, 1899. He stated that the theory of the Department appeared to be that the "*cedula de vecindad*," presented by natives of Cuba, Porto Rico, and the Philippines, would be issued by the authorities in those islands. This was formerly the case, but had ceased to be so, as the "*cedula de vecindad*" was a paper issued under Spanish law only to resident citizens or natives, at home or in the colonies, and was valid only for a year, at the expiration of which it was required to be renewed, under heavy penalties for the failure to renew it. Consequently, after the lapse of several months, persons, described as natives of Cuba or Porto Rico, began to apply for the registration of *cedulas* issued by municipal authorities in Spain. He at first declined to recognize these, but afterwards, on urgent representations that it was necessary to enable the applicant to secure passage on a Spanish steamer to Cuba or Porto Rico, consented to *visé* them, on the production of some additional evidence, written or oral, of the applicant's real nativity. In reality the applicant, unless he retained his Spanish nationality, was not required nor entitled by Spanish law to obtain the *cedula*, no such certificate being issued by Spanish

officials to aliens; and the cédulas in question were issued under the circumstances by the Spanish municipal officials without inquiry or evidence of identification. The Spanish authorities, besides, reprehended the visé of their official certificates as a sort of discourtesy. Mr. Storer inquired whether the circular was intended to cover the existing state of affairs, as would seem to be indicated by Department's No. 244.

Mr. Storer also stated that, since the occupation of Cuba and Porto Rico by the United States, no cédulas appeared to have been issued there, but instead certain papers by *alcaldes* in Porto Rico and by provincial governors in Cuba, varying in form and in contents, those from Porto Rico containing no personal description or recital of citizenship, the holder being described merely as "*vecino*" (resident), while those from Cuba gave a personal description, sometimes with the statement that the bearer was of "*nacionalidad Cubana*," or that he was a native of a certain city. Again, there was a certificate signed by the secretary of state and interior of Cuba, to the effect that the bearer, born in Spain, had not exercised the option of Spanish nationality under Art. IX. of the treaty of peace, "which fact constitutes the tacit renunciation of his nationality and the protection of the flag of Spain."

Mr. Storer asked for further instructions.

Mr. Hay, in his No. 283, of January 16, 1901, replied that, in view of the transitory conditions in Cuba, the uncertainties as to the actual and legislative future of the Philippines, and the pendency of the Porto Rican cases before the Supreme Court, the time was not thought to be ripe for formulating a general and permanent plan: that his course in authenticating the cédulas and passports, when it could not be avoided, was approved, and that the telegram of Nov. 6, 1900, was meant to authorize the visé of cédulas and passports when presented by Cubans and Porto Ricans, and by Filipinos when issued or countersigned by the military authorities in the Philippines. (For. Rel. 1901, 462.)

The consuls were authorized to certify only as to Cubans and Porto Ricans who were bona fide residents of those islands temporarily sojourning abroad. (For. Rel. 1901, 480-482.)

By the act of April 12, 1900, providing a civil government for Porto Rico, the inhabitants of Porto Rico continuing to reside therein, who were Spanish subjects residing in Porto Rico at the date of the ratification of the treaty of peace, were declared to be "citizens of Porto Rico," and as such "entitled to the protection of the United States."

"Passports are issued by the Department to persons entitled thereto, declaring that they are citizens of Porto Rico, and as such entitled to the protection of the United States."

Mr. Adée, Act. Sec. of State, to Mr. Vilas, Aug. 30, 1900, 247 MS. Dom. Let. 448.

As to the form of application for such a passport, see Mr. Hay, Sec. of State, to Mr. Schomburg, May 17, 1900, 245 MS. Dom. Let. 155.

The Department of State deems it wise to decline to issue passports to Porto Ricans as citizens of the United States before the Supreme Court of the United States shall have rendered a decision defining their status. (Mr. Hill, Act. Sec. of State, to Mr. Lenderink, chargé in Chile, April 29, 1901, For. Rel. 1901, 32.)

See, further, as to the status of Porto Ricans, *supra*, § 379.

For the act of July 1, 1902, declaring the people of the Philippines, etc. to be citizens of the Philippine Islands, see *supra*, § 379.

In respect of passports, natives of Guam were to be treated in the same manner as inhabitants of Porto Rico or the Philippines.

Mr. Hay, Sec. of State, to Mr. Storer, min. to Spain, Dec. 24, 1901, For. Rel. 1901, 485.

"Referring to your No. 1169 of January 25 last, touching the application for a passport made by Bernard Ehlers, a native of Honolulu, I inclose herewith copy of a dispatch from the special agent of the United States at Honolulu transmitting the reply of the Hawaiian minister for foreign affairs to the inquiry made by this Department as to whether the Hawaiian government considered Ehlers a bona fide citizen of those islands.

"As Mr. Ehlers's Hawaiian citizenship appears to be treated by Mr. Mott-Smith as an established fact, you may issue to Mr. Ehlers a document declaring that the bearer, Bernard Ehlers, is a citizen of the Hawaiian Islands, and as such is entitled to the protection of the United States.

"As in the case of Porto Ricans (Circular of May 2, 1899), United States passports can not be issued to natives of the Hawaiian Islands until their civil and political status has been determined by Congress."

Mr. Hay, Sec. of State, to Mr. White, amb. at Berlin, April 2, 1900, For. Rel. 1900, 521.

But, see *supra*, § 379, where it is shown that citizens of Hawaii were afterward declared to be citizens of the United States.

Section 4076 of the Revised Statutes of the United States, based on the act of August 18, 1856, provided that no passport should be "granted or issued to or verified for any other persons than citizens of the United States." As we have seen, the inhabitants of Porto Rico were, by the act of April 12, 1900, *supra*, declared to be "citizens of Porto Rico;" while the people of the Philippines were, by the act of July 1, 1902, declared to be "citizens of the Philippine Islands;" and passports were issued to them accordingly. In order to cover, generally, the case of the inhabitants of the insular possessions of the United States, who, while they had not been declared to be citizens, were declared to be entitled to the protection, of the United States, Congress, by the act of June 14, 1903, amended § 4076 so as to read: "No passport shall be granted or issued to or verified for any other

persons than those owing allegiance, whether citizens or not, to the United States."

Act of June 14, 1902, 32 Stat., part 1, p. 386.

"2. *To whom issued.*—The law forbids the granting of a passport to any person who is not a citizen of the United States, or who is not a loyal resident of an insular possession of the United States."

"9. *A resident of an insular possession of the United States who owes allegiance to the United States.*—In addition to the statements required by rule 3 [prescribing the contents of applications for passports], he must state that he owes allegiance to the United States and that he does not acknowledge allegiance to any other government; and must submit affidavits from at least two credible witnesses having good means of knowledge in substantiation of his statements of birth, residence, and loyalty."

Rules Governing the Granting and Issuing of Passports in the United States, September 12, 1903.

### 3. INDIANS.

#### § 497.

"I have to acknowledge the receipt of your No. 506, of the 11th ultimo, reporting the application of Humper Nespar, or Wadded Moccasin, a Sioux Indian, for a passport.

"In reply I have to say that Indians are not citizens of the United States by reason of birth within its limits. Neither are our *general* naturalization laws applicable to them, but various Indian tribes have been naturalized by *special* acts of Congress. Section 6 of the act of February 8, 1887 (24 Stat. 388), provides that 'every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States.'

"Section 43 of the act of May 2, 1890 (26 Stat. 99), provides that 'any member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application, as provided in the statutes of the United States.'

"Unless Humper Nespar was naturalized in one of the above modes, he is not entitled to a passport as a citizen of the United States.

"A copy of your despatch will be sent to the Interior Department and an effort made to determine definitely what his status is, as some Sioux tribes have been naturalized by special acts. Even if he has not acquired citizenship, he is a ward of the Government and entitled to the consideration and assistance of our diplomatic and consular officers. Your action in the case is therefore approved.

"In this connection reference to the case of 'Hampa,' reported in despatch No. 453, of May 7, 1896, from the consul at Odessa, is pertinent. Hampa, an American Indian, a member of a cowboy company which performed at Odessa, was discharged on account of drunkenness. The consul aided him, and upon the police requiring of Hampa a passport or document from the consulate, certifying to his identity, the consul issued the following:

"To whom it may concern:

"The bearer of this document is a North American Indian, whose name is Hampa. This Indian is a ward of the United States and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia and grant him permission to depart when he requires it.

"———, Consul.

"As the document expressly stated that Hampa was not a citizen of the United States and not entitled to a passport, its issuance could not be regarded as a violation of R. S. 4078. That section prohibits the granting by consular officers of passports to or for any person not a citizen of the United States. The same section also provides that no person not lawfully authorized so to do shall issue any passport or other instrument in the nature of a passport to or for any citizen of the United States, or to or for any person claiming to be or designated as such in such passport.

"The Department, at least tacitly, approved the consul's action in this case, and sees no valid objection to your issuing a similar document to Humper Nespar in the event of his failure to show that he is actually a citizen."

Mr. Sherman, Sec. of State, to Mr. Breckinridge, amb. to Russia, No. 391, April 3, 1897, MS. Inst. Russia, XVII. 558.

This instruction is also printed in Hunt's Am. Passport, 146.

#### 4. PERSONS OF COLOR.

#### § 498.

Since, by virtue of the Fourteenth Amendment and the naturalization laws, persons of African descent, if born or naturalized in the United States, are citizens thereof, no question as to their right to



receive passports any longer exist. Prior to the Civil War, however, passports in the usual form were not issued to them, though in some cases papers in the nature of passports, which were indiscriminately referred to as "passports" and "protections," were granted to free persons of color. These papers stated that the individuals to whom they were given were "free persons of color, born in the United States," and invoked for them all lawful aid and protection.

The Department of State did not consider these papers as being, in the proper legal sense, "passports."

"Your letter of the 4th instant, enclosing an extract from the 'Free Soil Courier,' relative to my not granting a passport to Henry Hambleton, a colored man, was this day received. In reply to your first enquiry, I am sure that there is no law requiring or authorizing me to grant a passport to a colored person, and applications for such a passport as was asked in this case have always been refused by every other Secretary of State. Enclosed is the certificate of the passport clerk of this Department who occupied that place under my predecessor. In answer to your second question, I reply that I am not a slaveholder, though I do not perceive of what importance it can be to know it."

Mr. Clayton, Sec. of State, to Mr. D. W. C. Clark, Burlington, Vt., Aug. 8, 1849, 37 MS. Dom. Let. 269.

For certain forms used, see Hunt's Am. Passport, 15-18.

Mr. Gadsden, minister of the United States in Mexico, issued, June 28, 1854, a circular to the American consuls in that country forbidding them to interfere in future in behalf of persons of African descent, born in the United States. Mr. Marcy, however, declined to accept this view, and gave instructions that, while a consul might not certify that such persons were citizens of the United States, he might certify that they were born in the United States and were free, and that the Government would regard it as its duty to protect them, if wronged by a foreign government, when within its jurisdiction for a legal and proper purpose.

Mr. Marcy, Sec. of State, to U. S. consul at Matamoras, Jan. 18, 1855, Moore, Int. Arbitrations, III. 2462.

By the Constitution, as construed by high authorities, free persons of color are not citizens of the United States and therefore cannot receive "passports," or claim when beyond the jurisdiction of the United States "the full rights of citizens;" but "the Secretary directs me to say that, though the Department could not certify that such persons are citizens of the United States, yet, if satisfied of the truth of the facts, it would give a certificate that they were born in the United States, are free, and that the Government thereof would

regard it to be its duty to protect them if wronged by a foreign government, while within its jurisdiction for a legal and proper purpose."

Mr. Thomas, Assist. Sec. of State, to Mr. Rice, Nov. 4, 1856, 46 MS. Dom. Let. 99.

This letter related to a request for passports for eleven colored persons, and cited, on the construction of the Constitution, opinions of Attorney-General Wirt, 1821, and "the present Attorney-General;" 2 Kent's Comm., 277, referring to opinions of Chief Justice Dagget, of Connecticut, in 1833, and the supreme court of Tennessee in Claiborne's case.

##### 5. PERSONS INCLUDED IN PASSPORT.

#### § 499.

"When husband and wife and minor children expect to travel together, a single passport for the whole will suffice. For any other person in the party a separate passport will be required."

Mr. Seward, Sec. of State, Circular, No. 24, Sept. 25, 1862, MS. Circulars, I. 211.

"According to the rules in force in general in the Department respecting the issue of passports, separate passports are issued to a father and his two children on a request therefor, or where reasonable cause is shown. In fact, the practice of including several members of the same family in one passport is to save trouble and expense to the parties themselves.

"Where good cause is shown therefor, such as the intended residence of one of a family in a foreign land, or a necessity for the use of a passport for a proper purpose, it would seem that the passports might well be issued on making proper application therefor and complying with the usual regulations."

Mr. Fish, Sec. of State, to Mr. Davis, min. to Germany, Nov. 4, 1876, MS. Inst. Germ., XVI. 252.

"When the applicant is accompanied by his wife, minor children, or servant who would be entitled to receive a passport, it will be sufficient to state the fact, giving the respective ages of the children and the allegiance of the servant, when one passport will suffice for all. For any other person in the party a separate passport will be required. A woman's passport may include her minor children and servant under the above-named conditions."

Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903.

The word "servant" does not include a governess, tutor, pupil, companion, or person holding like relations to the applicant for a passport. (Ibid.) See, also, Hunt's Am. Passport, 91-92.

"The servants mentioned in the application are not included [in the passport], as protections are only granted to citizens of the United States."

Mr. Crallé, Act. Sec. of State, to Mr. McLane, Oct. 26, 1844, 35 MS. Dom. Let. 9.

"A servant . . . can not be invested, by means of inclusion in a passport, with the right to protection which that document certifies the employer to possess as a citizen."

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 97, June 18, 1890, MS. Inst. Turkey, V. 134.

"This Government does not issue certificates of residence or 'protection papers' other than passports, which can only be granted to citizens. Adoption of an alien child by a citizen of the United States does not confer American citizenship upon the child."

Mr. Olney, Sec. of State, to Mr. McCandless, Feb. 13, 1896, 207 MS. Dom. Let. 681.

See, to the same effect, *supra*, § 415.

#### 6. WOMEN.

#### § 500.

In the issuance of passports, "the sex of the person is immaterial."

Mr. Blaine, Sec. of State, to Mr. Hirsch, min. to Turkey, No. 97, June 18, 1890, MS. Inst. Turkey, V. 134.

While a wife may, as is shown in the previous section, be, for convenience, included in her husband's passport, a woman, whether unmarried or married, or a widow, may, if a citizen of the United States, obtain a passport on her own account.

Where a woman, an alien by birth, but the widow of a citizen of the United States, applied, while residing in Switzerland, for a passport, it was held that, while she might, as a matter of strict law, remain a citizen, yet, as a citizen had no absolute right to a passport, it would be judicious to decline to grant her application unless she should give evidence of an intention to resume her residence in the United States.

Mr. Fish, Sec. of State, to Mr. Rublee, No. 210, April 11, 1876, MS. Inst. Switzerland, I. 382.

## 7. MINOR CHILDREN.

## § 501.

Passports are issued to minors who are citizens of the United States.

In the case of a minor, however, there may arise a question of double allegiance.<sup>a</sup> In order to meet this contingency, the Government of the United States, from 1870 to 1885, used a qualified form of passport in the case of children born abroad of American fathers. This form, as elsewhere appears, was discontinued, not because of any doubt as to the existence and operation of the principle of double allegiance, but because it was supposed that it might stand in the way of the assertion by the individual of the rights, if any, which might be derived from "domicil."<sup>b</sup> The form was not understood to deny or impair any right of American citizenship. It merely referred to the fact that a conflicting allegiance might exist. The form was merely precautionary, or suggestive, since a double allegiance does not always arise under the conditions to which it referred. Some countries do not claim, as the United States does, or, if they do so, claim only conditionally, the allegiance of all persons born on their soil and subject to their jurisdiction, even though born of alien parents. In order to determine the question, in a particular case, the municipal laws of the countries concerned must be known. It is erroneous either to speak or to think of a person as being a citizen, either *jure soli* or *jure sanguinis*, "by international law." International law recognizes both sources; it creates neither. If the municipal law of a particular country does not treat as citizens persons born on the soil, of alien parents, international law does not step in and thrust upon such persons the citizenship of the country. If, on the other hand, the municipal law does not impute citizenship to the foreign-born children of citizens, international law does not impute it. But it recognizes as readily the one rule as the other, as well as the fact that they may perchance both operate at the same time upon the same person.

Where application was made to the Department of State for passports for five persons residing in the island of Curaçoa, four of whom were born in that island and one in the island of Saint Thomas, and all of whom were children of native citizens of the United States, but it did not appear that any of the applicants had ever resided or

<sup>a</sup> For the law in relation to double allegiance, see *supra*, §§ 426-430.

<sup>b</sup> *Supra*, p. 846.

intended to reside in the United States, it was advised that they were not entitled to passports.

Hoar, At. Gen., 1869, 13 Op. 80.

This opinion, and the opinion of Attorney-General Pierrepont, in 1875, 15 Op. 15, are cited with approval by Mr. Blaine, who stated that they had "since been uniformly followed," in his instruction No. 33, Dec. 14, 1889, to Mr. Phelps, min. to Germany, MS. Inst. Germany, XVIII. 277.

"Section 4076 of the Revised Statutes expressly limits the grant or issue of passports to citizens of the United States, who must be held to be actual citizens only, so that there is no authority for the issue of passports certifying a qualified or restricted citizenship."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, May 7, 1888, For. Rel. 1888, I. 534, in relation to the case of Henry Asché, to whom a qualified passport was issued by the legation at Paris. The legation was instructed that it was desirable that the passport in question should, if it were practicable, be "recalled and cancelled."

"Should not passports be refused to the children of naturalized citizens born abroad, who have never been in the United States, and whose fathers are or were permanently residing abroad? . . .

"The answer is in the affirmative, with the qualification that the exclusion does not apply to cases in which the applicant, when arriving at majority, seeks the passport in order to return to the United States with the avowed intention of taking upon himself the duties and responsibilities of American citizenship. If, however, clear proof exists of the father's renunciation of American citizenship prior to the son's birth, then a passport should not be granted to the son."

Mr. Bayard, Sec. of State, to Mr. Vignaud, chargé at Paris, June 13, 1888, For. Rel. 1888, I. 542.

The Department of State, after mentioning the objections to issuing a passport to a person who had resided continuously for thirty years in France, the country of his origin, said: "As to the minor children of such a person born abroad, who were never in the United States, and not being *sui juris* can not elect their domicile or citizenship, the objection to issuing passports to them is even stronger; and during minority they can claim nothing more at least than their parent. The minor does not need a passport to enable him to come to the United States, to which country he can resort whenever he chooses."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, July 20, 1888, For. Rel. 1888, I. 551.

L. was born in the United States in 1862, his father being a naturalized citizen of German origin. In 1874 the father went to British

Columbia, where he became a naturalized British subject. L. accompanied his father to British Columbia, and was still residing there, when in 1889 he applied to the consul of the United States at Victoria for a passport as a citizen of the United States. Held, That, when the father became a British subject, L., being then a minor, was affected by the change of allegiance, and that as he had, since attaining his majority, elected to remain within the jurisdiction of Great Britain, he was not entitled to a passport as a citizen of the United States.

Mr. Wharton, Assist. Sec. of State, to Mr. Wheeler, May 8, 1889, 172, MS. Dom. Let. 11.

"It has been suggested to the Department that unless this Government recognizes the American citizenship of Arthur Altschul he may be liable to the claims of the German Government, within whose jurisdiction he was born and still lives. It has, however, repeatedly been held, upon the maturest consideration of the law, that the protection of this Government can not be employed for the purpose of enabling a person to escape his obligations to a government to which he owes valid allegiance, and that, in the case of double allegiance, a passport should not be granted by one of the Governments to which allegiance is due in order that the applicant may, while continuing to reside within the jurisdiction of the other, be exempt from its claims. This principle was laid down in 1869 in the case of certain persons residing in Curaçao (13 Op. 89, Hoar, At. Gen.) and again in 1875, in the case of one Steinkauler, in Prussia (15 Op. 15, Pierrepont, At. Gen.), and has since been universally followed."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, No. 33, Dec. 14, 1889, MS. Inst. Germany, XVIII. 277. In the text of this instruction, the opinion, in 15 Op. 15, is described as that of Attorney-General "Williams," but I have given it as Attorney-General Pierrepont's opinion, which it actually was.

John Maurice Hubbard, a minor, who was soon to come of age, was born in France of American parents. "By the French law of citizenship a person born in France of alien parents and domiciled in France at the time of reaching majority is allowed one year after reaching majority to elect to retain the citizenship of his parents. In default of so doing, at the expiration of that period and if retaining French domicile, he is to be deemed a citizen of France. It is therefore evident that the acquirement of French citizenship is optional, not obligatory, and that the interested party, on becoming *sui juris*, is, in any event, as free to choose his citizenship as his domicile.

"By the statutes of the United States Mr. Hubbard is by birth an American citizen. His right, however, to claim the protection of

this Government abroad may be affected by the lawful claims of the Government within whose jurisdiction he was born. It depends also upon those considerations which prevail in the case of any citizen of the United States who takes up his residence in a foreign country. If he desires a passport, he should prove to the legation, as is requisite in such cases, that he has a fixed purpose to come to this country within a reasonable time with the intent of making it his permanent home.

“John Maurice Hubbard’s intentions in regard to his future domicile are not stated; but, from the circumstance of his resorting to the procedure prescribed by French law to legalize his status as an alien continuing his residence in France, it may be inferred that Mr. Hubbard intends to keep up his present domicile beyond the year following his coming of age. If this be so, the interest which this Government would have in assuring his claim to American citizenship for the purpose of indefinite residence abroad is not apparent. Both international and statutory law in this relation aim to insure to the Government of which the party claims to be a citizen the right and free opportunity to exact of him the fulfillment of the duties of citizenship, as much as to secure to the party the enjoyment of the rights and privileges of citizenship. The relation to be established is reciprocal, involving the allegiance of the person to the state which protects him, as well as the obligation of the state to protect him while he shall bear true faith and allegiance to it.

“It rests, therefore, with Mr. Hubbard to determine his status on becoming *sui juris*. If he in good faith purposes to take up his abode in the United States and here perform the duties and enjoy the benefits of citizenship, he has clearly the right to do so and to be aided therein by his Government. But, if it be his purpose to remain indefinitely abroad, it is not incumbent upon this Government to assist him to evade the obligations of citizenship here and of domicile in France.

“It appears that the consul at Havre has supplied Mr. Hubbard with documentary evidence to justify his claim to be a citizen of the United States, and that such evidence may suffice to determine his status as an alien under the French law you quote. It is desirable that the nature of the consul’s intervention should be ascertained, and Mr. Williams will be called upon to report fully what he has done in the premises.

“Should Mr. Hubbard resort again to the legation after attaining legal age, you will satisfy yourself as to his intentions respecting his future domicile, and, should it appear that he purposes in good faith to perform the duties of citizenship, a passport may be issued to him. The Department sanctions no other evidence of citizenship than this. But if it shall appear that Mr. Hubbard has no fixed intent to dwell

in the United States, you will treat his case precisely as any other where the conduct of the applicant suggests a voluntary abandonment of the rights of protection claimed by him, and will withhold a passport."

Mr. Blaine, Sec. of State, to Mr. Reid, min. to France, No. 353, Oct. 30, 1891, For. Rel. 1891, 493.

See, also, Mr. Reid to Mr. Blaine, No. 428, Oct. 8, 1891, id. 491.

"The Department assumes that the statement of Mr. Thompson that he is trying to get a position for young Hubbard in the United States, is a bona fide evidence of intention to come and make a home in this country; and a passport, good for one year only, may be given him to assist in the accomplishment of that end.

"A passport is the only formal evidence the Department can give that the United States claims Mr. Hubbard as a citizen. If the French Government requires any other proof of claim, it would doubtless be fully developed in the correspondence which would follow any attempt of the French authorities to disregard the evidence of a passport. But Mr. Hubbard and his guardian should be distinctly advised that this Government can not be expected to manifest any interest in claiming as a citizen a person who is voluntarily withdrawn from the jurisdiction of our laws, and who exhibits no practical intention to fulfill the duties of citizenship. Unless Mr. Hubbard makes good his citizenship within the year, no new passport will be granted him."

Mr. Foster, Sec. of State, to Mr. Coolidge, min. to France, No. 119, Dec. 9, 1892, For. Rel. 169.

See Mr. Coolidge's No. 77, Nov. 12, 1892, For. Rel. 1892, 168.

As to the case of Jacob Woldenberg, in Russia, see Mr. Blaine, Sec. of State, to Mr. Smith, min. to Russia, No. 88, April 4, 1891, MS. Inst. Russ. XVII. 2.

C., the widow of an American citizen, applied to the legation of the United States at Berlin for a passport for herself and six minor children. It appeared that C. was of German birth, that she had resided abroad since 1873, that she was domiciled in Germany, that all her children were born abroad, and that it was her intention to live in Germany till their education was completed, the eldest being 18 and the youngest 3 years old. It was decided that a passport should be given to her, in order that "the right of her sons to elect American citizenship on their majority may be preserved unimpaired;" and, that, as they came of age, and separate passports became necessary to them, "their right thereto must be determined independently and upon their own merits."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, Nov. 11, 1891, For. Rel. 1891, 521.



H., born in the United States in 1874, was taken to Venezuela in 1875 by his father, who claimed to have previously declared his intention to become a citizen of the United States, and who in 1882 was appointed United States consular agent at San Cristobal, Venezuela. Subsequently the father, after thirty years' absence, returned to his native city, Hanover, taking with him H., who, early in 1892, being then an apprentice at Hamburg, applied for an American passport, declaring it to be his intention in three years, at the expiration of his apprenticeship, "to return to America to reside." Held, that a passport should issue, subject to any claim of Germany to his allegiance while he remained in that country, since he was born of a German father.

For. Rel. 1892, 184, 189. A similar decision was rendered in the case of A. B., *id.* 184, 188, 191.

By article 69 of the constitution of Brazil, it is declared that natives of Brazil, though their parents be foreigners, shall be Brazilian citizens. Certain persons, born in Brazil of American parents and residing in that country, applied to the legation at Rio for passports for purposes of protection while continuing to reside in Brazil. The legation declined to issue passports while the applicants voluntarily remained within Brazilian jurisdiction. Its action was approved.

Mr. Olney, Sec. of State, to Mr. Thompson, min. to Brazil, Nov. 12, 1895, For. Rel. 1895, I. 74.

D., a native of Russia, who had been naturalized in the United States, was held to have forfeited his right to a passport by reason of his return to and long residence, which was apparently to be continued, in his native country. His minor daughter, 20 years of age, who was born abroad, was, however, held to be entitled to a passport as an American citizen "for the purpose of quitting Russia now or after coming of age;" but it was stated that the passport "should be expressly valid for two years only from date, and not capable of renewal, should her stay in Russia two years hence be as indefinite as it apparently is now."

Mr. Olney, Sec. of State, to Mr. Peirce, chargé, No. 335, Nov. 18, 1896, MS. Inst. Russia, XVII. 516.

Where a person is born abroad of a father who was a naturalized citizen of the United States and who has remained out of the United States for a number of years, the first question to be determined is whether the father had at the time of the son's birth renounced his American citizenship. If he had not, the case of the son is to be treated like that of a native-born citizen of the United States who has gone abroad; and, if he has attained his majority

and has continued to reside abroad since so doing, he must show, before issuance of a passport to him, that he intends "to return to the United States within some reasonably definite period, or at least that he had a definite intention to return for the purpose of residing here permanently."

Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Nov. 8, 1897, For. Rel. 1897, 29, 30.

See, also, Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Nov. 10, 1897, For. Rel. 1897, 31.

George Victor Gross, born at Marseilles, France, Aug. 29, 1885, of an American father, applied to the American embassy in Paris, in July, 1900, for a passport. He stated that he intended to "return" to the United States in three years, and desired the passport for the purpose of visiting Germany. The embassy refused to grant the application, but the Department of State directed that the passport be issued, on the ground of the applicant's American citizenship under § 1993, R. S.

Mr. Adee, Act. Sec. of State, to Mr. Porter, Am. amb., No. 825, Aug. 28, 1900, MS. Inst. France, XXIV. 335.

See Mr. Hay, Sec. of State, to Mr. Porter, No. 712, Jan. 4, 1900, in relation to the case of John Raoul Doazan, who was born in the United States of a naturalized citizen of French origin, and who was taken when a minor by his father to France. (MS. Inst. France, XXIV. 253.)

The action of the embassy at Rome in granting a passport to the American-born child of Italian parents was approved. (Mr. Adee, Act. Sec. of State, to Mr. Iddings, chargé, Aug. 8, 1901, For. Rel. 1901, 303.)

B. was born in February, 1880, of American parents, at Buenos Ayres, in which city he had since resided down to January, 1901, with the exception of two years' absence at school. He desired a passport for use in Europe while on his way to the United States, where he expected to live. It was held that as B. was under § 1993, Revised Statutes, a citizen of the United States, it was proper to issue him a passport, it not appearing that the Argentine Government had made any claim to his allegiance and that he was about to leave that Republic finally and come to the United States.

Mr. Hay, Sec. of State, to Mr. Lord, min. to the Argentine Republic, Feb. 25, 1901, For. Rel. 1901, 2.

In the case of Rafael Franklin Hine, a youth of 19 years, who was born in Costa Rica of an American father, and was educated and had always lived in that country, but who claimed exemption from military service there as a citizen of the United States, it was held that he might, in virtue of § 1993, Revised Statutes, receive a pass-

port. It was added, however, that the question "how far the right to protect him may be exerted depends to a considerable extent upon the claims that Costa Rica has upon him under her law, upon which point the Department is not advised."

Mr. Hill, Acting Sec. of State, to Mr. Merry, mln. to Costa Rica, May 7, 1901, For. Rel. 1901, 421.

#### 8. DECLARATION OF INTENTION.

##### § 502.

Passports were at one time issued to persons who had declared their intention to become citizens of the United States. When the practice began, when it ended, and the extent to which it prevailed, the records of the Department of State do not enable us to say. The papers were not issued, however, to such persons as citizens, but only as residents who had declared their intention.

In 1823 an application was made for a passport for a Mr. Glazer. With the application there was filed a certified copy of his declaration of intention. In reply, Daniel Brent, chief clerk, for many years a useful and eminent official of the Department of State, enclosed "the passport of this Department," and added: "The Secretary regrets that he can not give a passport to him [Mr. Glazer] as an actual citizen, but only as a resident, having an intention to become one according to the official certificate furnished."

Mr. Brent to Mr. Graff, June 7, 1823, MS. Notes to For. Leg. III. 137.

Hunt's Am. Passport, 12, 44, mentions a "special passport" granted by Mr. Clay, as Secretary of State, March 15, 1825, to a declarant; but the form there given indicates that it was the passport usually issued at that time in such cases. The language of Mr. Brent seems hardly to leave room for doubt on this point.

"I regret that your request in respect to Mr. Zeller can not be complied with. As he is not a citizen of the United States, but only intends to become one, a passport can not be granted to him by this Department."

Mr. Forsyth, Sec. of State, to Mr. Ingersoll, Nov. 27, 1835, 28 MS. Dom. Let. 159.

See, to the same effect, the following: Mr. Forsyth, Sec. of State, to Mr. Brewster, June 15, 1836, 28 MS. Dom. Let. 347.

Mr. Webster, Sec. of State, to Mr. Ostreuner, April 11, 1842, 32 MS. Dom. Let. 287.

Mr. Calhoun, Sec. of State, to Mr. Rohe, May 7, 1844, 34 MS. Dom. Let. 175.

"Your letter of the 13th instant has been received, in which you enclose a certificate in behalf of Fred Schulenberg, a respectable resi-

dent of this county, who intends to start in a few days on a journey to Europe, but having neglected to take the necessary steps for his final admission as a citizen, and there being no court in session at this moment to which he could apply, he is now without the certificate of naturalization required by the circular lately received. I enclose, however, the certificate of his first declaration, and respectfully suggest whether the Department could, under the circumstances, grant the applicant a passport.'

"I regret to say that this is impossible. This Department has authority to grant passports only to citizens of the United States. The passport certifies that the bearer *is* a citizen, and you will readily perceive that such a certificate can not be given to anyone not a native citizen, until every requisite prescribed by law to his becoming a citizen has been actually fulfilled. His intention to become so may be ever so manifest, and his right to become so at any moment he pleases may be ever so clear and unquestionable; still this does not make him one; on the contrary, it renders it certain that he is not one. This is the plain letter, and the plain meaning and operation of the law, and the subject is one in regard to which the Department possesses no discretionary power whatever."

Mr. Buchanan, Sec. of State, to Mr. Huren, Aug. 20, 1846, 36 MS. Dom. Let. 73.

For the circular above referred to see Hunt's American Passport, 46.

See, to the same effect, Mr. Buchanan, Sec. of State, to Mr. Hoeftin, Feb. 24, 1847, 36 MS. Dom. Let. 188.

Also, Mr. Clayton, Sec. of State, to Mr. Thompson, Aug. 25, 1849, 37 MS. Dom. Let. 284; to Mr. Hannegan, Sept. 20, 1849, MS. Inst. Prussia, XIV. 173.

Mr. Webster, Sec. of State, to Mrs. Melkleham, Jan. 23, 1852, 39 MS. Dom. Let. 471.

"With respect to the certificates of courts of justice in favor of persons who have declared their intention to become citizens, the case is in some degree different. They have taken the preliminary step toward naturalization, and seem to be entitled to some recognition of that step. While you cannot grant them passports as citizens, there is no impropriety in authenticating their certificates by the usual countersign. It will be for the European authorities to pay such respect to the document as they think proper. The passport itself is but a request to foreign governments to allow the bearer to enter and pass through their dominions, and urgent reasons of state warrant them in refusing to do so. No just offense could be taken by the United States if the certificates in question should prove of little value to the holders. In all common cases, however, they would probably prove as valuable as passports; and as those who obtain them have disabled themselves from procuring passports from their own governments,

they seem to have some claim to all the aid in this way which we can with propriety give them."

Mr. Everett, Sec. of State, to Mr. Ingersoll, min. to England, Dec. 21, 1852.  
MS. Inst. Gr. Brit. XVI. 180.

"Passports are not issued from this Department to any person not a native of the United States who shall not have complied with the naturalization laws. The diplomatic and consular agents abroad have no authority to countersign any certificate issued by any State or municipal authority to a person who may have merely declared his intention to become a citizen."

Mr. Marcy, Sec. of State, to Mr. Wolf, May 31, 1853, 41 MS. Dom. Let. 401.  
See, also, Mr. Marcy, Sec. of State, to Mr. Young, Aug. 29, 1853, 41 MS. Dom. Let. 499; Mr. Hunter, Act. Sec. of State, to Mr. Keeler, Aug. 21, 1854, 43 MS. Dom. Let. 72.

For a reference to a circular letter to diplomatic and consular officers, given to the Germania Musical Society, of Boston, the members of which were said to have declared their intention to become citizens, and to whom it was said passports could not be issued, see Mr. Marcy, Sec. of State, to Mr. Brandt, Jan. 2, 1854, 42 MS. Dom. Let. 137.

"If he goes abroad with papers showing that he has declared his intention to become a citizen of the United States, and presents them to our ministers, they are required, if they think the documents genuine, to make an indorsement on them to that effect unless such ministers have reason to believe that such intention has been abandoned."

Mr. Marcy, Sec. of State, to Mr. Buchanan, min. to England, Apr. 13, 1854, MS. Inst. Gr. Brit. XVI. 285.

"The subject of passports, to which you refer in your No. 6, is one which of late has very much occupied the attention of this Department, and in regard to which our representatives are expected to exercise great vigilance to prevent the deception and abuses which are not unfrequently practiced in regard to them. Instructions on the subject have been addressed to several of our legations, and it is contemplated to prepare a general circular which will, as far as possible, cover the whole ground.

"The impropriety of any of our legations granting a passport to a foreigner under any circumstances, even with the omission of the clause asserting citizenship, and merely asking for the bearer liberty to pass freely is obvious, for as this Department possesses the faculty of granting passports only to bona fide citizens of the United States, and as the passport is merely a certificate of citizenship, it follows, as a matter of course, that no representative of the United States can with propriety give a passport to an alien.

"Further, if an alien or foreigner has become domiciled in the United States, or declared his intention to become an American citi-

zen, he is not entitled to a passport declaring him to be a citizen of the United States. Both of these classes of persons, however, may be entitled to some recognition by this Government. The most that can be done for them by your legation is to certify to the genuineness of their papers when presented for attestation and when there can be no reasonable doubt as to their being authentic; and to this simple certificate that, to the best of the belief of the legation, the documents in question are genuine, the European authorities are at perfect liberty to pay such respect as they think proper.

“This Government cannot rightfully, and does not, claim of foreign powers the same consideration for a declaration of intention to become a citizen as for a regular passport. The declaration, indeed, is *prima facie* evidence that the person who made it was at its date domiciled in the United States and entitled thereby, though not to all, to certain rights of a citizen, and to much more consideration when abroad than is due to one who has never been in our country; but the declarant not being a citizen under our laws, even while domiciled here, cannot enjoy all the rights of citizenship either here or abroad. He is entitled to our care, and in most circumstances we have a right to consider him as under our protection; and this Government is disposed and ready to grant him all the benefits he can or ought to receive in such situation. If such individual, however, afterwards leaves this country, goes to another, and there takes up his permanent abode, his connection with the United States is dissolved, and his intention to become a citizen must be considered to have been abandoned. Under the circumstances the previous declaration ceases to be available for any purposes whatever. But when a person with a fair intent has made his declaration and goes abroad for any purpose not incompatible with the objects of the declaration, and the legation has certified to the genuineness of his papers, the Government of the United States has done all that can be required or reasonably expected and can have no just cause of complaint if other governments see fit to refuse to give the same effect to such papers as they usually give to regular passports in the hands of a citizen.”

Mr. Marcy, Sec. of State, to Mr. Siebels, min. to Belgium, No. 6, May 27, 1854, MS. Inst. Belg. I. 82.

A substantially identical instruction may be found in Mr. Marcy, Sec. of State, to Mr. Fay, *chargé d'affaires* to Switzerland, No. 10, May 27, 1854, MS. Inst. Switz. I. 11.

See, also, Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, No. 23, Dec. 28, 1854, under *Domicil*, *supra*, § 491.

Similar language may also be found in Mr. Marcy to Mr. Buchanan, min. to England, April 13, 1854, MS. Inst. Gr. Br. XVI. 285, an extract from which is given above; also in Mr. Marcy, Sec. of State, to Mr. Jackson, *chargé d'affaires* at Vienna, No. 17, Sept. 14, 1854, MS. Inst. Austria, I. 100.

"As this Department grants passports only to *bona fide* citizens of the United States, and as a passport is nothing more than a certificate of citizenship, it follows, necessarily, that you can, with propriety, give a passport neither to an alien who may have become domiciled in the United States nor to a foreigner who has merely declared his intention to become an American citizen, although both of these classes of persons may be entitled to some recognition by this Government. The most that can be done by you is to certify to the genuineness of their papers when presented for your attestation, and when you have no reasonable doubts of their authenticity. The authorities of foreign states may pay such respect to these documents as they may think proper. The verification which should be placed upon the back of the certificate might be in these words:

" 'LEGATION OF THE UNITED STATES

" 'At ———.

" 'I hereby certify that, according to the best of my knowledge and belief, the within document is genuine.

{ SEAL OF THE  
LEGATION }

" 'J. A. P.' "

Mr. Marcy, Sec. of State, to Mr. Peden, Apr. 10, 1856, MS. Inst. Arg. Rep. XV. 91.

This form of certification was given in Mr. Marcy, Sec. of State, to Mr. Clay, min. to Peru, No. 23, Dec. 28, 1854, MS. Inst. Peru, XV. 150.

It will be observed that the instruction to Mr. Peden is an abbreviation of those sent in 1854 to Mr. Siebels and other ministers, and reverts substantially to the position taken by Mr. Everett in his instruction to Mr. Ingersoll, of Dec. 21, 1851, above quoted. The amplifications in the instructions of 1854 evidently were due to the influence of the then recent Koszta case.

"The act of Congress [of Aug. 18, 1856] forbidding the issue of passports except to citizens was passed very soon after the incident of Martin Koszta, and that case was presumably in contemplation of the law-makers." (Mr. Hunter, Act. Sec. of State, to Mr. Rowan, Sept. 6, 1869, 82 MS. Dom. Let. 39.)

"A copy of the regulations of the Department upon the subject of passports is herewith enclosed, from which you will perceive that they are furnished to citizens of the United States only. As Mr. Steinbach has only declared his intention to become a citizen, his case is not embraced by the rule. No other paper than a passport which can lawfully be issued is ever granted by this Department upon such an occasion."

Mr. Cass, Sec. of State, to Mr. Stevenson, M. C., Dec. 5, 1860, 53 MS. Dom. Let. 290.

"It appears that you are a person of foreign birth, who has declared his intention to become a citizen of the United States, but no evidence is furnished that you have yet been naturalized. It

also appears that your age is sixty-four. The only persons of foreign birth not naturalized who are entitled to passports are those who, having declared their intention to become citizens, are liable to military duty. By reason of your age, you are excluded from this class. To entitle you to a passport it will be necessary for you to furnish this Department with proof that you have become a citizen of the United States. The evidence required is a certificate of citizenship, under the seal of the court in which you were naturalized."

Mr. F. W. Seward, Act. Sec. of State, to Mr. Glassman, Nov. 4, 1863, 62 MS. Dom. Let. 207.

This letter refers to the act of March 3, 1863, 12 Stat. 754, under which persons liable to military duty were exempted from the operation of the provision of the act of Aug. 18, 1856, forbidding the issuance of passports to any but citizens. This exemption was done away with by the act of May 30, 1866, 14 Stat. 54, which also expressly provided: "And hereafter passports shall be issued only to citizens of the United States."

See Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, No. 180, Oct. 4, 1870, MS. Inst. France, XVIII. 428; Mr. Bayard, Sec. of State, to Mr. Coleman, chargé at Berlin, No. 334, July 10, 1888, For. Rel. 1888, I. 646; Mr. Bayard, Sec. of State, to Mr. Stein, Aug. 28, 1888, 169 MS. Dom. Let. 503.

"By law of Congress, passports can be granted to those only who are native-born citizens or who have completed their naturalization. This Government can not, therefore, extend its protection to those who are not recognized by its laws as citizens."

Mr. Seward, Sec. of State, to Mr. Walker, Aug. 24, 1868, 79 MS. Dom. Let. 239.

"The acts of Mr. Sanford, and the correspondence with Mr. Mason, Mr. Buchanan, and Mr. Belmont, appear to be anterior to the act of 1856, which, with the act of 1866, establishes a positive rule for the guidance of public officers. . . . It is clearly the duty of the Secretary of State not to authorize passports to be 'granted, issued, or verified in foreign countries by diplomatic or consular officers of the United States to or for any other persons than citizens of the United States.' If this law apparently operates harshly upon persons who, by reason of their declaration of intention to become citizens of the United States, suppose themselves entitled to the protection of its representative abroad, it is for the law-making power to determine whether it is wise to change the policy which has so long been established. While the law remains as it is, I can see no 'official' protection which can be extended to persons who are not citizens of the United States. The granting of an official certificate of protection, by an officer of the Government who is authorized to issue such certificates, implies a committal of the Government in advance to enforo-



ing that protection by official interference and by other acts which may eventually lead to the employment of force. This consideration, taken in connection with the clear provisions of law in that respect and with the well-defined policy of the law, induced the Department to issue the circular of October last, prohibiting the granting of letters of protection except in the form of passports, and prohibiting the granting of passports to any but citizens of the United States."

Mr. Fish, Sec. of State, to Mr. Washburne, mln. to France, Oct. 4, 1870, MS. Inst. France, XVIII. 428. See Mr. Fish, Sec. of State, to Mr. Boker, mln. to Turkey, April 19, 1872, MS. Inst. Turkey, II. 400.

In denying a request for a passport for a native British subject who had declared his intention to become a citizen of the United States, Mr. Bayard said: "A declaration of intention does not involve abjuration of original allegiance. That only takes place when the party is finally admitted to citizenship. We have a naturalization treaty with Great Britain, by the first article of which the full effect and validity of lawful naturalization is mutually recognized, and by implication change of allegiance is not recognized until lawful naturalization is complete. There would seem to be, therefore, no obstacle to the party in question quitting this country under a British passport."

Mr. Bayard, Sec. of State, to Mr. Wilson, Oct. 17, 1885, 157 MS. Dom. Let. 392.

See Mr. Bayard, Sec. of State, to Mr. Melvin, Oct. 26, 1885, 157 MS. Dom. Let. 447; Mr. Bayard, Sec. of State, to Mr. Coleman, chargé at Berlin, No. 334, July 10, 1888, For. Rel. 1888, I. 646; Mr. Bayard, Sec. of State, to Mr. Stein, Aug. 28, 1888, 169 MS. Dom. Let. 503.

Since passports can be issued only to citizens of the United States, the Secretary of State has no power to issue a certificate of domicil, or a certificate stating that he is "satisfied" that a certain individual "has his domicil in the United States."

Mr. Bayard, Sec. of State, to Mr. Develin, Oct. 21, 1887, For. Rel. 1887, 355. See *supra*, § 491.

"I have to acknowledge the receipt of your letter of the 13th ultimo, with which you transmit certain documents in relation to the Reverend Guido F. Verbeck, a native of the Netherlands and a missionary of the Board of Foreign Missions of the Reformed Church of America. Among these documents is a letter written by the Honorable William H. Seward, on the 5th of April, 1859, to Townsend Harris, esq., then minister of the United States to Japan, stating that, while Mr. Verbeck, who was then about to set out for that country, having only declared his intention to become a citizen of the United States and not having been naturalized, was not entitled to

receive a passport, yet it was held 'in the celebrated Koszta case' that a declaration of intention was 'sufficient to entitle the bearer to the protection of our Government and of its naval authorities abroad.' And in conclusion Mr. Seward said: 'Mr. Verbeck is a very worthy man, and I beg to commend him to your protection, which may, perhaps, be needed under the peculiar circumstances of his migration to Japan.'

"You state that Mr. Verbeck, since his return to the United States in 1889, 'has made every effort to complete his naturalization and become de facto an American citizen, but without success,' and that you are 'informed by one of the judges of the court of common pleas of this city and county (New York) that there is no way known to our laws by which his desire can be realized.' As the ground of this opinion is not disclosed, it is supposed that it refers only to the period of residence in the United States which our naturalization laws require. In view, however, of the fact that Mr. Verbeck is unable now to obtain naturalization, you request that the Secretary of State give him a letter similar to that written by Mr. Seward in 1859.

"The Department has carefully examined the papers submitted to it and the various rulings on the question presented, and has failed to discover that the law has ever been so construed as to permit the Secretary of State to grant a letter of the purport of that now requested. It may not, perhaps, have been observed that the letter of Mr. Seward was not written by him as Secretary of State, but nearly two years before he came into this office, when Jeremiah S. Black was Secretary of State. It was, therefore, only a letter of personal commendation and not an official guarantee of protection. The duties of the Secretary of State on this subject are well defined. In an instruction to the minister of the United States to the Argentine Republic, of March 27, 1867, Mr. Seward, then Secretary of State, said: 'Passports are the only protection papers known in the law, or sanctioned in this Department.' Mr. Marcy, who conducted the correspondence in the Koszta case, three years later, in an instruction to one of our ministers of April 10, 1856, said that a passport could with propriety be issued 'neither to an alien who may have become domiciled in the United States nor to a foreigner who has merely declared his intention to become an American citizen, although both of these classes of persons may be entitled to some recognition by this Government. The most,' he continued, 'that can be done by you is to certify to the genuineness of their papers when presented for your attestation, and when you have no reasonable doubts of their authenticity. The authorities of foreign states may pay such respect to these documents as they may think proper.' I shall only quote one more ruling of the Department, as follows: 'It is clearly the duty of the Secretary of State not to authorize passports to be

granted, issued, or verified in foreign countries by diplomatic or consular officers of the United States to or for any other persons than citizens of the United States. If this law apparently operates harshly upon persons who, by reason of their declaration of intention to become citizens of the United States, suppose themselves entitled to the protection of its representatives abroad, it is for the law-making power to determine whether it is wise to change the policy which has so long been established. While the law remains as it is, I can see no official protection which can be extended to persons who are not citizens of the United States.'

"This was written by Mr. Fish, when Secretary of State, on October 4, 1870, to the minister of the United States to Switzerland, and expresses clearly and comprehensively the construction uniformly given to the law both before and afterwards.

"The Department has not failed to observe that it has been inferred from the documents now before it, as stated in your letter, that Mr. Verbeck has constantly been 'recognized as under the protection of the United States, and treated in all respects as a citizen thereof.' The strongest evidence to that effect is the certificate given by Mr. De Long on April 10, 1873. In this certificate Mr. De Long stated that he was unable to issue a passport because Mr. Verbeck could not at the time produce other evidence of citizenship than a declaration of intention, and that he consequently issued the certificate in lieu of a passport. In regard to this certificate, it is to be observed, in the first place, that it was directly in conflict with the law as previously construed by Mr. Marcy, by Mr. Seward, and by Mr. Fish, as Secretaries of State, in the instructions above quoted, and as uniformly construed by their successors. In the second place, it may be noticed that, on the same day as that on which the certificate was issued, Mr. De Long gave Mr. Verbeck, who appears to have been on the point of visiting Europe, a letter commending him to the 'most favorable personal and official acquaintance' of the minister of Holland in Rome, and requesting the latter, if Mr. Verbeck should by any chance become involved in trouble, to intervene and do all in his power to aid him. To this Mr. De Long added the request that the minister would also present Mr. Verbeck to the minister of the United States at Rome.

"If Mr. Verbeck should become involved in any difficulty it would not be improper, in view of his previous history and long connection with an American board of missions, for the minister of the United States in Tokio to extend to him his good offices. But, as the law authorizes an assurance of official protection only to citizens of the United States, the Department is not permitted to go further. The leading prescription of the conditions of citizenship is 'as binding

upon the Department as upon the courts; and, as Mr. Verbeck has not complied with those conditions so as to enable him to be admitted to citizenship, the Department is unable, by giving him such a letter as that requested, to assume to confer upon him a status that the law denies to him."

Mr. Blaine, Sec. of State, to Mr. Cobb, Dec. 5, 1890, 180 MS. Dom. Let. 95.  
See, also, Mr. Blaine, Sec. of State, to Mr. Nortz, April 3, 1890, 177 MS. Dom. Let. 146.

Where a diplomatic representative issued a certificate that the person named therein had "declared his intention to become a citizen of the United States," and urged that, as he also asserted an intention to become "fully naturalized" "at the earliest opportunity," "he be accorded the protection and courtesy usually given citizens of the United States," the Department of State declared that the issuance of such certificate was a violation both of the laws of the United States and of the regulations of the Department, and directed that "steps should be promptly taken to recall it."

Mr. Adee, Act. Sec. of State, to Mr. Russell, No. 285, Aug. 21, 1890, MS. Inst. Venezuela, IV. 662.

#### IV. APPLICATIONS.

##### 1. FORMS AND EVIDENCE.

#### § 503.

For some time after the establishment of the Government of the United States no definite rules were prescribed with regard to applications for passports or the evidence on which they were granted. The lack of definite requirements apparently resulted in many persons obtaining passports who were not entitled to them. A circular concerning applications and the evidence by which they must be accompanied was issued by the Department of State in 1845, and since that time various regulations have been established and enforced.

"In order . . . that you may be furnished with passports for Mrs. Susannah Smith (your mother-in-law), your wife, and two children, it will be necessary that you send us proof of your own and of the citizenship of the first-mentioned lady, and that you likewise inform us of the Christian name of Madam Latour. A certificate from the clerk of the court before which you became naturalized, or an intimation from any respectable person in Baltimore, that he knows Mrs. Smith and yourself to be citizens of the United States, will be sufficient."

Mr. Brent, acting chief clerk, to Mr. Latour, Aug. 14, 1804, 14 MS. Dom. Let. 353.

"Respect for the passport of an American minister abroad is indispensable for the safety of his fellow-citizens travelling with it, and nothing would be so fatal to that respect as the experience that his passport had been abusively obtained by persons not entitled to it. All passports should be gratuitously given, and a record or list kept of all those which you may deliver, containing the name and voucher of American citizenship of the persons to whom they are given. They may be refused even to citizens of the United States who have so far expatriated themselves as to have become bound in allegiance to other nations, or who in any other manner have forfeited the protection of their own. Protections to seamen are not included under the denomination of passports, nor are they ever granted by public ministers. Seamen may, nevertheless, like other citizens, occasionally want the passport of the minister, and be equally entitled to it."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, No. 2, April 28, 1823, MS. Inst. U. States Ministers, IX. 175.

See, also, Mr. Adams, Sec. of State, to Mr. Allen, Nov. 30, 1823, MS. Inst. U. States Ministers, X. 123.

"Your observations on the importance of great care in preventing foreigners from protecting themselves under American passports are very just, particularly in the case of Spaniards who use them to evade the laws of Mexico. In proportion to the care which all our public agents ought to take in giving proper protection to our citizens, ought to be their circumspection in preventing others, not entitled to that privilege, from usurping it. The President therefore highly approves the precautions you have taken in the instances you mention. And you are instructed to use every proper endeavor to convince the Mexican Government of the sincerity of your exertions to detect impositions of this kind in pursuance of what you may assure them is the wish of the President."

Mr. Livingston, Sec. of State, to Mr. Butler, June 26, 1831, MS. Inst. Am. States, XIV. 203.

For a printed form of application that came into use in 1830, see Hunt's Am. Passport, 45.

"I am directed by the Secretary to acquaint you, in answer to your application for a passport for Francis W. Lusak, that the proof of citizenship which accompanied that application is not deemed satisfactory. It is expected that all naturalized citizens who may wish passports will either send to this office the certificate of citizenship, granted by the court in which they were admitted, or that they will exhibit the same to a notary or other magistrate, who must certify under his official seal to the fact of such an exhibition."

Mr. Brent, chief clerk, to Mr. Cooper, Feb. 23, 1832, 25 MS. Dom. Let. 29.

"Satisfactory evidence of citizenship is necessary before he can be furnished with a passport. A notarial certificate of the fact is not deemed sufficient, although it is quite proper that the evidence transmitted be authenticated by a notary."

Mr. Dickins, Act. Sec. of State, to Mr. Williams, Aug. 6, 1836, 28 MS. Dom. Let. 397.

"Passports are only granted to citizens of the United States. If you know the persons applying to be such, by sending a description of their persons embracing the following particulars—age, stature (feet, inches), forehead, nose, mouth, chin, hair, complexion, face—to this Department, the passports will be forwarded to yourself or them as you may direct.

"P. S.—A description of the gentlemen is all that is necessary."

Mr. Forsyth, Sec. of State, to Mr. McKennan, Feb. 7, 1837, 29 MS. Dom. Let. 7.

The Mr. McKennan to whom this letter was addressed was the Hon. Th. M. T. McKennan, of the House of Representatives. Taken in connection with the preceding letter of Mr. Dickins to Mr. Williams, it indicates that the statement of Mr. Williams, as a member of Congress, was received in lieu of the usual evidence of citizenship.

"Applicants for passports are required to furnish this Department with proof of citizenship, as well as a description of their persons. If native citizens, their own affidavit to the fact, made before a justice of the peace or notary, is sufficient; if naturalized, the certificate of naturalization must be forwarded to the Department, and will be returned with the passport."

Mr. Webster, Sec. of State, to Mr. Patterson, Feb. 10, 1843, 33 MS. Dom. Let. 71.

To the same effect is Mr. Webster, Sec. of State, to Mr. Ducassel, April 1, 1843, 33 MS. Dom. Let. 131.

"All applications for passports must be accompanied by evidence of citizenship. If a native citizen of the United States, an affidavit made by yourself before a notary public, and one other citizen to whom he is personally known, will be sufficient; and if a naturalized citizen, his certificate of naturalization must be transmitted for inspection. I refer you to the annexed circular for further particulars."

Mr. Buchanan, Sec. of State, to Mr. Wilkens, Oct. 16, 1845, 35 MS. Dom. Let. 291.

Mr. Buchanan seems to have been the first Secretary of State to issue a circular of instructions, giving particulars as to passport applications. The circular in question, dated July, 1845, is in Hunt's Am. Passport, 46. See, also, in the same publications, p. 47, a reference to a yet fuller circular issued by Mr. Buchanan, as Secretary of State, in May, 1846.

"A person who is entitled to receive a passport, if within the United States, must make a written application, in the form of an affidavit, to the Secretary of State.

"The affidavit must be attested by an officer authorized to administer oaths, and if he has an official seal it must be affixed. If he has no seal, his official character must be authenticated by certificate of the proper legal officer.

"If the applicant signs by mark, two attesting witnesses to his signature are required.

"The applicant is required to state the date and place of his birth, his occupation, and the place of his permanent residence, and within what length of time he intends to return to the United States with the purpose of residing and performing the duties of citizenship therein.

"The applicant must take the oath of allegiance to the Government of the United States.

"The application must be accompanied by a description of the person applying, and should state the following particulars, viz: Age, ———; stature, — feet — inches (English measure); forehead, ———; eyes, ———; nose, ———; mouth, ———; chin, ———; hair, ———; complexion, ———; face, ———.

"The application must be accompanied by a certificate from at least one credible witness that the applicant is the person he represents himself to be, and that the facts stated in the affidavit are true to the best of the witness's knowledge and belief."

Rules governing the granting and issuing of passports in the United States, Sept. 12, 1903.

"14. *Blank forms of application.*—They will be furnished by the Department to persons who desire to apply for passports, but are not furnished, except as samples, to those who make a business of procuring passports.

"15. *Address.*—Communications should be addressed to the Department of State, Passport Bureau, and each communication should give the post-office address of the person to whom the answer is to be directed.

"16. *Rejection of application.*—The Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose." (Ibid.)

As to rules governing applications prior to 1898, see Hunt's *Am. Passport*, 48-64.

See a circular of Mr. Bayard, Sec. of State, to diplomatic officers abroad, Feb. 23, 1887, printed in *For. Rel.* 1887, 1134; also, what purport to be revised regulations of May 1, 1886, in relation to passports, as printed in Wharton's *Int. Law Digest*, II. 469-471, but apparently not now of record in the Department of State.

Where the object is to obtain a passport for an insane person, the application may be made and proper papers presented by the guardian or nearest friend of the person in question. "Even were this not

the case, the regulations in regard to issuing passports are not imposed by Congress, but are discretionary with the Executive, and may at any time be interpreted or modified by the Department of State. They should certainly not be applied in such a way as to exclude from a passport persons by whom it may be most needed, as in the present case."

Mr. Porter, Acting Sec. of State, to Mr. Winchester, min. to Switzerland, No. 4, July 11, 1885, For. Rel. 1885, 807.

The action of the legation of the United States at St. Petersburg in declining to comply with the request of the public prosecutor of the Moscow district for the evidence on which a passport was issued to a naturalized citizen of the United States was approved by the Department of State, especially as it was presumed that the information was sought for the purpose of sustaining a charge of naturalization abroad without the permission of the Russian Government.

For. Rel. 1896, 522.

Although the restrictions upon the issuance of passports are sometimes evaded by applying first to one legation and then to another, it has not been found to be practicable to apply a remedy by notifying all other missions of the rejection of an application by one of them. The circular of the Department of State of February 25, 1897, requires applicants to declare whether they have applied elsewhere and been refused a passport. The good judgment of each envoy is trusted to scrutinize passport applications presented to him, with a view of eliciting the facts and acting accordingly.

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, Feb. 4, 1899, For. Rel. 1899, 84, 85.

"Believing, as I do, that, under the statute governing the issuance of passports, declarations of identity, made by applicants for passports before a consular officer charged for the time being with the care of American interests, should be entitled to full faith and credit by the officials or agents of this Government, I have instructed Mr. Straus, at Constantinople, in this sense."

Mr. Hay, Sec. of State, to Mr. Elliot, Jan. 12, 1900, 170 MS. Inst. Consuls, 476.

## 2. NATIVE CITIZENS.

### § 504.

Appropriate forms of applications are furnished for the use of (1) native citizens, (2) naturalized citizens, (3) persons claiming citizenship through the naturalization of parent or husband, and (4) residents of the insular possessions of the United States.



An application, containing the information indicated in the extract given in the foregoing section from the rules of 1903, suffices in the case of native citizens.

Persons born in the United States of alien parents are not required to produce proofs of the subsequent naturalization of their parents, since their citizenship is derived not from their parents' naturalization, but from the fact of their American birth, the Constitution of the United States providing that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Mr. Hill, Act. Sec. of State, to Mr. White, ambass. to Germany, May 21, 1901, For. Rel. 1901, 178.

See, also, Mr. Wharton, Act. Sec. of State, to Mr. Phelps, min. to Germany, No. 276, July 22, 1891, For. Rel. 1891, 515.

But a person born abroad, whose father was a native citizen of the United States, must show that his father was born in the United States, and resided therein, and was a citizen at the time of the applicant's birth. The affidavit to this effect may be required to be supported by the affidavit of one other citizen acquainted with the facts.

Rules governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903.

### 3. NATURALIZED CITIZENS.

#### § 505.

"A naturalized citizen must transmit his certificate of naturalization, or a duly certified copy of the court record thereof, with his application. It will be returned to him after inspection. He must state in his affidavit when and from what port he emigrated to this country, what ship he sailed in, where he has lived since his arrival in the United States, when and before what court he was naturalized, and that he is the identical person described in the certificate of naturalization. The signature to the application should conform in orthography to the applicant's name as written in his certificate of naturalization, or an explanation of the difference should be submitted."

Rules Governing the Granting and Issuance of Passports in the United States, Sept. 12, 1903.

The wife or widow of a naturalized citizen, if she claims citizenship by virtue of her husband's naturalization, "must transmit for inspection her husband's certificate of naturalization, must state that she

is the wife (or widow) of the person described therein, and must set forth the facts of his emigration, naturalization, and residence, as required in the rule governing the application of a naturalized citizen."

Ibid.

"I have to state that, in relation to the party who has lost his naturalization papers obtained in a State now in insurrection against the Government of the United States, it will be sufficient in order to obtain a passport from this Department if he shall make affidavit of the facts in the case, joined with that of a person who has some [seen] such papers in his possession."

Mr. Seward, Sec. of State, to Mr. Latham, July 23, 1861, 54 MS. Dom. Let. 331.

W. E. B. applied to the United States legation at Buenos Ayres for a passport, alleging that he was a naturalized American citizen of German birth, but that he had lost his certificate of naturalization. As he was unable to furnish proof of such loss, the legation at first declined to issue a passport, but afterwards granted one on his producing the affidavits of two American sea captains, said to be known to the United States consul as "good and true men," which declared that the affiants knew that W. E. B. was "a naturalized citizen under the laws of the State of New York," and that his representations were true. With reference to the case as thus stated, and without having before it the original documents, the Department of State said that the action of the legation appeared to have been improvident.

Mr. Bayard, Sec. of State, to Mr. Hanna, min. to Argentine Republic, No. 61, March 27, 1888, For. Rel. 1888, I. 11.

"(1) Is a passport to be refused to the wife or widow of a naturalized citizen who has not the naturalization papers of her husband?

"(2) Is a passport to be refused to a naturalized citizen who has left his naturalization papers at home, or who has lost them? . . .

"The legation should require the original certificate or a duly certified copy thereof to be produced as the best evidence of citizenship. If the applicant shall be unable to produce a certificate of naturalization or a certified copy thereof, then the naturalization certificate, like all other records, may be proved by parol, but to admit parol proof of it the following conditions must exist:

"(a) The prior existence of the certificate must be shown.

"(b) If burned or otherwise destroyed, such destruction of the certificate must be proved.

"(c) If lost, diligent but ineffectual search for it must be shown.

"(d) Parol proof of a lost or destroyed certificate should not be received if the original record of naturalization, of which a certified copy could be procured, is attainable. A party who can not produce his naturalization certificate can not supply it by parol proof unless he also prove that the original record of naturalization is unattainable and can not be reproduced by a certified copy."

Mr. Bayard, Sec. of State, to M. Vignaud, chargé at Paris, No. 343, June 13, 1888, For. Rel. 1888, I. 542.

This instruction was reaffirmed by Mr. Rives, Act. Sec. of State, to Mr. McLane, June 30, 1888, For. Rel. 1888, I. 547.

"You suggest that a discrimination is made, under the instructions recently given to you, between natives and naturalized citizens of the United States, or at least that applicants for passports may allege the existence of such a discrimination. The answer to this suggestion seems to me plain. The rule of proof applied to each class of citizens is the same; and it is the well-known legal rule, universally adopted, that in all cases the proof to be submitted of the existence of a fact must be the best proof of which the case is in its nature susceptible. In the case of native citizens of the United States, as there is no system in existence of individual registration, such as exists in some other countries, the best proof is by affidavit and personal identification to the satisfaction of the legation. But in the case of naturalized citizens additional and other facts essentially different must be established.

"By the laws of the United States naturalization of a foreign-born person to be an American citizen is intrusted to the courts of record, both of the several States and of the United States. By the rules of evidence, as universally administered here, the record of such court can be proved either by an inspection of the records themselves or by a certified copy under the seal of the court; and such evidence is the conclusive and sole proof of the action of the court.

"Whenever the question of citizenship is brought in issue within the United States the certified abstract from the record of the court is required to establish the fact of naturalization. In cases of loss or destruction of the original records an exception is made, but then the ground for the introduction of secondary evidence must be laid by proofs in the usual mode.

"It is not perceived how a less stringent rule could properly be laid down for the guidance of the agents of the Government residing in foreign countries. The expediency of increased strictness is rather apparent, when the serious nature and consequences of the guarantees of national protection which are to accompany the issue of a passport are taken into consideration. At the present time, questions of

allegiance and citizenship are undergoing unusually serious examination in Europe, especially in the provinces of Alsace and Lorraine, lately part of the territory of France, but in which German power is now maintained in consequence of cession under the duress of war. The obligations of the Government to its citizens are of the most far-reaching nature, and the United States expect to perform their full duty in protecting their citizens abroad, but the fact of such citizenship must be established before our intervention can be appealed to. It is not competent for this Department to alter the law which makes naturalization the act of a judicial court of record, and for that reason to be proven like other records.

"The hardships of the enforcement of the rule here insisted upon, and which is not, as you seem to suppose, of recent origin, are more apparent than real. The procurement of a certificate of naturalization under the seal of the court is easy and inexpensive, and duplicates can always be obtained before going abroad, or within a fortnight, by telegraphing, by anyone now in Europe.

"The instructions heretofore given (No. 343) have thus been reviewed in the light of your recent representations, and it is not perceived how this Department, consistently with public interests or duty, can dispense with the customary and reasonable proof of American naturalized citizenship.

"The present time appears opportune to inform that portion of the public who propose in their residence in foreign countries to enjoy all the privileges of American citizenship, that at least they must establish their right to do so by the usual and easily acquired proofs."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, July 20, 1888,  
For. Rel. 1888, I. 552.

"I have to acknowledge the receipt of your No. 645, of the 23d ultimo, in which you inform the Department of your issuance of a passport to Mr. Max Hellman, a naturalized citizen of the United States, without the exhibition by him of his certificate of naturalization, as required by the rules of this Department. You state that he is well known to you personally, that he has been a naturalized citizen of the United States for thirty years, and that while he failed to produce a certificate of naturalization, he exhibited passports heretofore issued to him by this Department, and also by the American legation at Paris.

"Upon these facts, and especially in view of your personal knowledge of the applicant, your action is approved. The personal knowledge of a minister of the United States necessarily obviates the necessity of more formal proof."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Aug. 10, 1888,  
For. Rel. 1888, I. 553.

"In cases recently presented at Paris and elsewhere, in which persons of good repute and widely known have alleged that they had left their certificates of naturalization at home, and were, consequently, unable to produce them to the legation, the Department has held that the certificate of the minister as to his personal knowledge of the status of the applicant would suffice to permit the issuance of a passport."

Mr. Blaine, Sec. of State, to Mr. Grant, June 6, 1889, MS. Inst. to Austria III. 495.

"Only under exceptional circumstances should a passport be issued to a naturalized citizen without a previous inspection of his naturalization certificate. Occasionally, when the good faith of the applicant is palpable and the refusal to issue the passport might work hardship, the fact that he has lost or left behind him his certificate may not operate to cause the minister to refuse him his passport, but the circumstances of the case should be always set forth and the applicant's sworn statement of them should be required."

Mr. Adee, Act. Sec. of State, to Mr. Storer, min. to Belgium, July 23, 1897, For. Rel. 1897, 25.

"You state that your predecessor issued a passport on January 11, 1875, to Mr. Hennessy, wife, and son, and that he now applies to you for a new passport, but that he is unable to present his certificate of naturalization, being of alien birth, alleging that it has been destroyed by fire. You ask for instructions as to your duty in this case and in similar applications which may come before you. In reply you are informed that the requirement that a person of alien birth should produce his certificate of naturalization when making application for a passport is of long standing and should be carefully enforced; but sometimes, through the loss or destruction of the document, it is necessary to make an exception to the rule when the issuing official is satisfied of the good faith of the application and when its rejection might result in serious inconvenience or hardship. The nature of the secondary evidence which may be required is governed by the circumstances surrounding each case, but the general rule laid down in Mr. Bayard's instruction to Mr. Vignaud, June 13, 1888 (Foreign Relations, 1888, p. 542), appears to be applicable to the case under consideration:

"(a) The prior existence of the certificate must be shown.

"(b) If burned or otherwise destroyed, such destruction of the certificate must be proved. . . .

"A party who can not produce his naturalization certificate can not supply it by parole proof unless he also proves that the original record of the naturalization is unattainable and can not be reproduced by a certified copy."

"In issuing Mr. Hennessy a passport under the conditions set forth above it would be well to advise him that for his future protection and convenience he should make an effort to have the record of his naturalization restored. As it was, according to his statement, recorded in a Chicago court, it is thought he may be able to accomplish its restoration under the 'burnt record act' passed by the Illinois legislature some years since for the relief of persons in Mr. Hennessy's situation."

Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Sept. 1, 1897,  
For. Rel. 1897, 26.

A passport was issued by the United States embassy in London to a person who stated in his application that he was born in England and emigrated to the United States, and that he was naturalized before "a court at Boston on or about the year 1874." He produced no certificate of naturalization, nor apparently any other proof of citizenship, but the embassy seemed to have issued the passport on the strength of the fact that he bore a circular letter of introduction from the Department of State. The Department ruled that such a letter was not evidence of citizenship.

Mr. Day, Acting Sec. of State, to Mr. White, chargé d'affaires ad interim,  
Feb. 17, 1898, For. Rel. 1898, 363.

Application was made to the United States legation in Paris for a passport in the name of Stephen Emil Heidenheimer, who claimed to be a naturalized citizen of the United States. It subsequently transpired that he was naturalized in 1871, six months before he had completed the requisite term of five years' residence. It was therefore held that he was not a citizen, and that under sec. 4076, R. S., he was not entitled to a passport.

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Dec. 8, 1888,  
For. Rel. 1888, I. 565.

"Does a certificate of naturalization, if properly attested, justify, ipso facto, the issue of a passport, provided identity of applicant be established?"

"A properly authenticated certificate of naturalization, issued by a court having jurisdiction, is conclusive evidence that the person named therein has been admitted to citizenship, and can only be set aside by direct proceedings to that end. Still, if it is made to appear that the naturalization of the applicant was fraudulently obtained, the Secretary of State, in the exercise of his discretion with respect to the granting of passports even to citizens, which is given him by section 4075, R. S., will refuse the applicant a passport, without reference to his rights otherwise as a citizen, until his naturalization be

regularly annulled by the courts. Every applicant, however, whether native born or naturalized, in addition to his citizenship, is to be required to comply with the other regulations governing the issuance of passports."

Mr. Blaine, Sec. of State, to Mr. Ryan, min. to Mexico, April 9, 1892, MS. Inst. Mexico, XXIII. 203. See supra, §§ 422-425.

Where an applicant for a passport stated that he was 22 years old when he arrived in the United States, and that he was 25 when naturalized, it was held that his witnesses "must in some way have misled the court" as to his age and the duration of his residence, and that unless the matter could be cleared up he could not receive a passport.

Mr. Foster, Sec. of State, to Mr. Newberry, No. 355, July 18, 1892, MS. Inst. Turkey, V. 367.

#### 4. CITIZENSHIP THROUGH PARENT'S NATURALIZATION.

##### § 506.

The applicant, when claiming citizenship through a parent's naturalization, "must state that he or she is the son or daughter, as the case may be, of the person described in the certificate of naturalization, which must be submitted for inspection, and must set forth the facts of emigration, naturalization, and residence, as required in the rule governing the application of a naturalized citizen."

Rules Governing the Granting and Issuance of Passports in the United States, Sept. 12, 1903.

Where a person born abroad of an alien father claims citizenship through the subsequent naturalization of his father, it may be necessary for him to produce "evidence that he himself resided in the United States at some time during minority," since "naturalization of the parent here does not confer citizenship on his minor children born abroad before that event and continuing to reside and attain their majority abroad."

Mr. Foster, Sec. of State, to Mr. Lincoln, min. at London, Aug. 10, 1892, For. Rel. 1892, 233.

See, also, Mr. Bayard, Sec. of State, to Mr. Thompson, min. to Hayti, No. 26, July 6, 1888, For. Rel. 1888, II. 1422.

"It not infrequently happens that the son of a naturalized citizen of the United States secures naturalization in his own right because of the difficulty of proving his father's naturalization."

Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Sept. 18, 1897, For. Rel. 1897, 27.

Persons claiming citizenship through the naturalization of their parents are required, when applying to the Department of State

for passports, to produce the parent's certificate of naturalization. Paragraph 154 of the Instructions to Diplomatic Officers of the United States authorizes diplomatic agents abroad to accept as evidence of citizenship a passport issued by the Department of State, if presented before its expiration. It is not in any case "intended that secondary proof may not on rare occasions be accepted in lieu of the naturalization certificate. The question is fully discussed in the Department's publication, *The American Passport*, page 155 et seq. In Mr. Bayard's instruction to Mr. Vignaud, June 13, 1888, quoted on page 161, the general nature of the secondary proof acceptable is set forth. In a few words, it must establish that the father was actually naturalized before the son reached his majority.

"It may be added that the existing requirement of production of the naturalization certificate has prevailed since 1873; and experience has shown it to be necessary in order to prevent the Department or its agents from granting passports to those who are not legally citizens of the United States."

Mr. Hay, Sec. of State, to Mr. Choate, amb. to England, Feb. 5, 1901,  
For. Rel. 1901. 207.

#### 5. EVIDENCE OF PREVIOUS PASSPORT.

#### § 507.

"It is not thought . . . that, under ordinary circumstances, if the bona fides of the original passport be in no ways impeached, it is necessary that the papers of naturalization, or a new affidavit of allegiance, should be produced in order to obtain a new passport. The case may be likened to a proceeding for the revival of a judgment, on which the original cause of action need not be proved."

Mr. Bayard, Sec. of State, to Mr. Lee, chargé, No. 11, Oct. 2, 1885, MS.  
Inst. Aust.-Hung. III. 363.

The foregoing statement referred to an application made to the American legation in Vienna for a passport, in place of an expired passport issued four years previously by the Department of State.

In 1888 a person claiming to be a naturalized citizen of the United States applied to the American legation in Paris for a passport, presenting as evidence of citizenship a passport issued by the Department of State in 1879. The legation having declined to issue a passport, he addressed the Department of State, which replied:

"By a regulation of this Department, in force for many years, passports are good only for two years, on or before the expiration of which period they are required to be renewed. This regulation has the double effect of enabling the Government to keep trace of



those claiming its protection abroad and of requiring from them a small contribution to the expenses of the Government whose protection they enjoy.

"It is for these reasons, and because of the regulation fixing two years as the period of vitality of a passport, that diplomatic officers have contemporaneously been forbidden to accept a passport more than two years old as sufficient evidence of citizenship to warrant the issuance of a new passport. This rule applies to native and naturalized citizens of the United States impartially, and where a citizen of the United States presents himself to a legation for the renewal of a passport more than two years old he is required, whether a native or naturalized citizen, to present the same sort of evidence of citizenship as that upon which his passport was originally obtained."

Mr. Adee, Second Asst. Sec. of State, to Mr. Twyeffort, July 13, 1888, For. Rel. 1888, I. 551.

"Does a passport less than two years' old entitle its holder to a new passport, even if he be unable to make definite and satisfactory declaration under any or all of the heads in the prescribed form of passport applications?"

"A person presenting an application for a passport should fully comply with all of the rules and regulations in force at the time with respect thereto, independently of any previous passport which may have been issued to him. Such a previous passport, although less than two years old, is simply of value as *prima facie* evidence of the applicant's citizenship. If it appears to have been issued upon an identical state of facts, it might also to a certain extent afford a precedent, though not necessarily controlling. Since a passport is good for two years, an applicant for a new one within that period should satisfactorily explain why the new passport is sought."

Mr. Blaine, Sec. of State, to Mr. Ryan, min. to Mexico, April 9, 1892, MS. Inst. Mex. XXIII. 203.

Where a person applied to the legation of the United States at St. Petersburg as a naturalized citizen and explained his failure to produce his certificate of naturalization by stating that it had been stolen, it seems to have been intimated by the Department of State that the issuance to him by the legation of a passport ten years previously might be treated as evidence that satisfactory proof of the fact of naturalization was then made, it being alleged that the loss of the certificate occurred prior to that time. It does not appear, however, that the second application was ultimately granted.

For. Rel. 1893, 537.

A passport was issued by the United States legation at St. Petersburg to one Hugo Sundel in 1882. It was granted on the sole evidence of a passport issued to him by the Department of State.

Sept. 7, 1876, on his sworn statement that he was a native of the United States. In 1896, being under arrest at Moscow, he declared to the United States consul that he was born in Russian Poland, where he was known as Hugo Sundolovitch, and that between 1869 and 1872 he emigrated without permission to the United States, where he was naturalized. Under the circumstances, no evidence of his naturalization having ever been produced, it was held that he must, in the absence of such evidence, "be deemed a Russian subject."

Mr. Rockhill, acting Sec. of State, to Mr. Breckinridge, min. to Russia, Sept. 19, 1896, For. Rel. 1896, 522.

"It is usually expected that a person claiming citizenship through the naturalization of parents should, on each occasion of applying for a passport, produce the evidence by way of corroboration. The possession of a Department passport is, however, *prima facie* evidence of the applicant's having previously produced to the Department the proof of the parents' naturalization; and inability to produce that evidence at each subsequent application for a passport need not occasion refusal to grant one unless the circumstances of the case should raise such reasonable doubt in the mind of the envoy as to cause him to make further inquiry of the Department."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, Feb. 4, 1899, For. Rel. 1899, 84, 85.

"Paragraphs Nos. 153 and 154 of the Instructions to the Diplomatic Officers of the United States and the same numbered paragraphs of the Regulations Prescribed for the Use of the Consular Service of the United States provide that when a person applies to a diplomatic or consular officer for a new passport his old passport may be accepted in lieu of his naturalization certificate, if it was issued at the mission or consulate to which the new application is made, and that such an old passport, if issued by the Department of State, may be so accepted for the same purpose if the application is made before the old passport has expired—that is, within two years of the date of its issuance.

"There appearing to be no good reason why an old passport, without regard to the time or place of its issuance, should not be accepted as evidence *prima facie* that the person it describes properly established his citizenship when the old passport was granted him, and as our citizens who fail to carry with them in their travels the proof of citizenship which they once produced to this Department or its agents abroad sometimes experience great inconvenience because they are refused passports under the regulations cited above, it has been deemed desirable to remedy the difficulty by rescinding these regulations and adding to the paragraph which precedes them

(No. 152) a clause permitting, in an application for a new passport, the acceptance of the old passport as evidence *prima facie* that the applicant established his citizenship when he made the application upon which the old passport was granted.

"To this end an Executive order was issued on the 31st ultimo, a copy of which is appended."

Mr. Hill, Act. Sec. of State, to U. S. Dip. and Consular officers, circular, Feb. 8, 1901, MS. Circulars, V.

The Executive order, signed by President McKinley, Jan. 31, 1901, reads as follows:

"Paragraphs Nos. 153 and 154 of the Instructions to the Diplomatic Officers of the United States, prescribed January 4, 1897, and paragraphs Nos. 153 and 154 of the Regulations Prescribed for the Use of the Consular Service of the United States, December 31, 1896, are hereby repealed, and it is ordered that paragraph No. 152 of the aforesaid Instructions and No. 152 of the aforesaid regulations be so amended as to read:

"152. Expiration of passport.—A passport expires two years after the date of its issuance, and cannot be removed. A new passport may be issued upon a new application in accordance with the provisions of paragraph 151, but an old passport will be accepted as *prima facie* evidence that the citizenship of the applicant was properly proved when the old passport was granted, and a naturalized citizen need not, therefore, be required to produce the naturalization certificate through which he acquired his citizenship again. The old passport should be retained and sent to the Department of State with the application in making the report required in paragraph 163. If there is any doubt, however, surrounding the case, the applicant should be required to produce the same evidence that would be required of him if he were making his first application for a passport."

(MS. Circulars, V.)

See correspondence in For. Rel. 1901, 207.

A passport issued by the Department of State should always be accepted by a legation abroad as *prima facie* proof of the citizenship of the person to whom it was issued, should he apply to such legation for a new passport.

Mr. Hay, Sec. of State, to Mr. Hardy, min. to Switzerland, Apr. 23, 1901, For. Rel. 1901, 508.

In an exceptional case, where the certificate of naturalization was not produced, and the passport, issued by the Department of State, was alleged to have been taken and lost by the Turkish police, a passport was issued by the legation at Constantinople. The Department of State was "disposed to conclude that this was an exceptional case, where the issuance of the passport without the primary proof of citizenship was permissible; but in every case of this kind the legation should affix to the application an explanatory statement justifying the apparent departure from those rules which experience has shown must be carefully observed to protect this Government from imposition." (Mr. Hay, Sec. of State, to Mr. Griscom, chargé at Constantinople, No. 356, March 6, 1901, MS. Inst. Turkey, VII. 521.)

## 6. OATH OF ALLEGIANCE.

## § 508.

"A passport cannot be issued to any citizen, claiming the protection of this Government, who is unwilling, at a time of peril like the present, to make known his loyalty by taking the oath of allegiance."

Mr. Seward, Sec. of State, to Mr. Hillin, Aug. 23, 1861, 54 MS. Dom. Let. 527.

No oath of allegiance had previously been required of persons applying for passports.

"It has been deemed proper to require of all persons, who may, hereafter apply for passports, that they shall take the oath of allegiance, as prescribed by law, a copy of which is herewith enclosed, and the regulation will be strictly enforced in all cases. Your course in declining to receive applications of persons who sympathised with those in insurrection against the Government, meets the approval of this Department."

Mr. F. W. Seward, Assist. Sec. of State, to Mr. Corey, notary public, New York, Aug. 26, 1861, 54 MS. Dom. Let. 545.

The law here referred to is the act of August 6, 1861, 12 Stat. 326.

As is elsewhere shown, a regulation adopted in 1861 required "the loyalty of all Americans applying for passports or visés to be tested under oath." (Infra, § 532.)

The form of oath of allegiance was changed by the act of May 13, 1884, 23 Stat. 21.

"Mr. E——'s refusal to take the prescribed oath of allegiance is . . . of itself a sufficient ground for declining to issue a passport to him. He may, in fact, be a citizen of the United States and that fact appear by competent proof, but his right to protection as a citizen abroad will depend on his purpose to fulfil the obligations of good citizenship, whereof allegiance is the highest. This requisite cannot be waived in any case, native born or otherwise. In the case of an applicant born abroad, as Mr. E—— was, it is especially imperative, particularly if he were born prior to his father's naturalization, for in such a case the son is not constrained by his father's act to be a citizen. The father's naturalization is no proof of the son's loyalty; he must evidence that by his own acts. In this relation it may be remarked that Mr. E—— could not have served [as he said he had done] in the Army of the United States without taking the oath of allegiance. If he has done so once, it is not easy to fathom his present scruples."

Mr. Foster, Sec. of State, to Mr. Newberry, No. 357, July 21, 1892, MS. Inst. Turkey, V. 369.

"This Government has no disposition to deny any loyal citizen traveling or sojourning abroad in lawful pursuit of his business or pleasure the protection of a passport; nor does it desire to place upon him any requirements of application for a passport repugnant to his conscience or the free exercise of his religious belief. But it is manifestly proper that before issuing a passport the government should exact from the person who applies for it a promise that he will on his part support and defend the government whose protection he solicits.

"The oath of allegiance is, therefore, required from all persons before they are granted passports, and to this regulation the Department adheres; nor will it accept an oath which contains any alteration or addition tending to invalidate it. The words added by Mr. D—— amount to a protest against the Constitution of the United States, and it is understood that such is the intention of their meaning. The Department cannot accept this oath, and so far declines to recede from the position set forth in the letter of September 30.

"It is not doubted, however, that Mr. D—— is a citizen of the United States, and the antecedents of the sect to which he belongs have tended to demonstrate the loyalty of its members to the Government of the United States. In order, therefore, that no hardships may be visited upon any loyal citizens because they follow the dictates of conscience, the Department is willing to reconsider so much of the letter of September 30 as refuses to accept any modification of the form of the oath as now prescribed, and Mr. D—— may submit another application, containing the oath of allegiance in the form now used, except that the word 'Government' may be inserted for the word 'Constitution,' and the statement added 'that I acknowledge allegiance to no other government,' so that the oath shall read:

"'Further, I do solemnly swear that I will support and defend the Government of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I owe allegiance to no other government, and that I take this obligation freely, without any mental reservation or purpose of evasion. So help me God.'"

Mr. Day, Assist. Sec. of State, to Mr. Morrison, October 7, 1897, 221 MS. Dom. Let. 362.

The usual oath reads: "Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely," etc., as above.

## 7. NAME OF APPLICANT.

## § 509.

"This Department cannot issue a passport containing a name different from that set out in the naturalization certificate upon which the application is based.

"It is suggested that the proper procedure would be to apply to the court for a correction of the certificate of naturalization."

Mr. Gresham, Sec. of State, to Mr. Raine, June 4, 1894, 197 MS. Dom. Let. 245.

A similar ruling of the Department of State of Aug. 20, 1872, is given in Hunt's Am. Passport, 154.

A person naturalized as Juda Osiel asked for a passport as Leon Osiel, saying that he had changed his name since his naturalization. The Department said that if he would produce proper affidavits as to the change of his name and establishing the identity of Juda Osiel with Leon Osiel, the Department would issue a passport to "Juda Osiel, commonly known as Leon Osiel," but it could not omit the name by which he was naturalized.

Mr. Wharton, Act. Sec. of State, to Mr. Osiel, July 8, 1889, 173 MS. Dom. Let. 547.

"The Department has received your letter of October 5, stating that you came to this country when nine years of age, that your father was naturalized as an American citizen, and that he had changed his name from Redicker to Ritter. . . . The Department will issue a passport in your favor upon receiving a satisfactory application accompanied by the proof of your citizenship as indicated by the enclosed form and rules. It will be necessary, however, that you should also submit competent proof that your father legally effected a change of his name. This proof should be a duly certified copy of the legal record of the change. If such a record cannot be produced, after that fact shall have been established, the Department will consider secondary evidence coming from credible witnesses having personal knowledge of the facts as set forth by you."

Mr. Day, Assist. Sec. of State, to Mr. Ritter, October 6, 1897, 221 MS. Dom. Let. 348.

See a similar ruling of April 10, 1892, in Hunt's Am. Passport, 154.

## 8. TITLES, PERSONAL OR OFFICIAL.

## § 510.

Neither official nor professional titles, nor statements of the holder's business or occupation, are inserted in the passport granted by the Government of the United States.

Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903; Hunt, Am. Passport, 216.

As the naturalization laws require renunciation of any title or order of nobility, a passport will not be issued to a naturalized citizen under such a title or designation, nor will a passport be issued on an application containing it.

Mr. Hay, Sec. of State, to Mr. Porter, amb. to France, No. 745, March 15, 1900, MS. Inst. France, XXIV. 273, in relation to the case of Baron Seillière, *supra*, § 491; *infra*, § 513.

#### 9. FEES.

#### § 511.

“Passports are granted by the Department gratis.”

Mr. Dickinson, Act. Sec. of State, to Mr. Ashley, Oct. 20, 1836, 28 MS. Dom. Let. 444.

“The postage on letters to the Department relative to passports should be *prepaid*, and that accruing on the transmission of passports must also be defrayed by the individuals for whom they are intended.” (Mr. Trist, Act. Sec. of State, to Mr. Gifford, Oct. 1, 1845, 35 MS. Dom. Let. 230.)

The act of Aug. 18, 1856, while providing, in accordance with the previous practice, that no fee should be charged for passports issued in the United States, permitted a charge of not more than a dollar on those issued abroad. (11 Stat. 60.)

See Mr. Evarts, Sec. of State, to Mr. Christlancy, No. 92, July 22, 1880, MS. Inst. Peru, XVI. 456.

By the internal revenue act of July 1, 1862, 12 Stat. 472, a charge of three dollars was prescribed for every passport issued in the United States or abroad. In giving notice of this enactment, Mr. Seward stated that so much of the Personal Instructions to Ministers as directed the issuance of passports by them “free of charge,” and so much of the Consular Regulations as authorized a fee of a dollar for a passport issued by a consul general or consul, was annulled.

Mr. Seward, Sec. of State, to U. S. min. and consuls, circular, No. 15, July 5, 1862, MS. Circulars, I. 201.

“The consular fee for issuing a passport is one dollar, payable in coin, and by act of Congress of June 30, 1864, an additional sum of \$5.00 is imposed as an ‘internal revenue’ fee, which, in the opinion of this Department, is payable in the currency of the United States in coterminous British provinces.”

Mr. Seward, Sec. of State, to Mr. Fessenden, Sec. of Treas., Jan. 18, 1865, 67 MS. Dom. Let. 575.

By sec. 3 of the act of July 14, 1870, 16 Stat. 256, the tax of \$5.00 on each passport was abolished on and after Oct. 1, 1870; but consuls continued “to collect the fee of one dollar for viséing a passport.”

Mr. J. C. B. Davis, Act. Sec. of State, to U. S. mins. & consuls, circular, Aug. 27, 1870, MS. Circulars, I. 418.

"In pursuance of the authority conferred upon me by the 16th section of the act entitled 'An act to regulate the diplomatic and consular systems of the United States,' approved August 18, 1856, I do hereby prescribe, in addition to the fees heretofore prescribed, that the sum of five dollars shall be charged for the granting or issuing of each passport granted or issued in any foreign country, by any diplomatic or consular officer of the United States."

President Grant, Executive order, Oct. 13, 1871, MS. Circulars, I. 448.

A passport can not be issued free of charge. (Mr. Fish, Sec. of State, to Mr. Rublee, No. 210, April 11, 1876, MS. Inst. Switzerland, I. 382.)

"By act of Congress, approved June 20, 1874, a fee of \$5.00 is required to be collected for every citizen's passport. . . . A passport is good for two years from its date and no longer. A new one may be obtained by . . . paying the fee of five dollars," etc.

Instructions in regard to passports, Department of State, May 1, 1886, Wharton's Int. Law Dig. II. 470. As to this citation see comment *supra*, § 503.

By the act of Congress of March 23, 1888, a fee of one dollar is exacted for every citizen's passport.

25 Stat. 45.

Under Executive order, the same fee is charged abroad.

The number of "travelling passports" called for "by Americans in Japan in 1891-1892 was 1,645; and the expense of messenger and postal service involved was \$97.39. To meet these outlays you suggest the imposition of fees. In reply to your inquiry, I have to refer you to the provisions of sec. 1745 of the Revised Statutes of the United States, by which you will see that an imposition of fees, such as you suggest, would require the special authorization of the President. It does not appear to me that such interposition is at present necessary."

Mr. Foster, Sec. of State, to Mr. Coombs, No. 22, Aug. 17, 1892, MS. Inst. Japan, IV. 62.

## V. GROUNDS OF REFUSAL.

### 1. DISCRETION AS TO ISSUANCE.

#### § 512.

Passports "may be refused even to citizens of the United States, who have so far expatriated themselves as to have become bound in allegiance to other nations, or who in any other manner have forfeited the protection of their own."

Mr. Adams, Sec. of State, to Mr. Nelson, min. to Spain, No. 2, April 28, 1823, MS. Inst. U. States ministers, IX. 175.



"Insurrectionary assemblages avow the fact that they are sending agents to Europe on errands hostile and injurious to the peace of the country and dangerous to the Union. Such agents ought not to be allowed to pervert the authority of the Government so as to sanction their proceedings. You are therefore strictly enjoined to grant no passport whatever to any person of whose loyalty to the Union you have not the most complete and satisfactory evidence. You will further immediately make report to this Department in every instance of the passport granted, and the evidences on which the grant is made."

Mr. Seward, Sec. of State, circular, May 6, 1861, MS. Circulars, I. 179.

"I am of the opinion that any citizen of the United States has a right to be furnished with such evidence of citizenship, and of his right to the protection of his Government, as has been adopted for that purpose, upon complying with the usual regulations, and that the necessity therefor is a matter for the judgment of the party himself. A passport duly issued is the usual evidence of citizenship in a foreign land.

"It would therefore seem that the desire of a naturalized citizen to be supplied with the usual evidence of his nationality, in case he be called upon for military service, is natural and entirely allowable."

Mr. Fish, Sec. of State, to Mr. Davis, Jan. 14, 1875, MS. Inst. Germ. XVI. 6.

"The issuing of passports is at the discretion of the Secretary (Rev. Stat., § 4075), and they will not be granted to persons engaged in violation of the laws of the United States."

Mr. Bayard, Sec. of State, general instructions in regard to passports, May 1, 1886, Wharton's Int. Law Dig. II. 469, 471. As to this citation, see comment *supra*, § 503.

"Determination of the fact of citizenship is not an executive function. What is reserved to the executive is the use of its proper discretion as to the protection of a person abroad when the facts *prima facie* establish his citizenship by origin or naturalization, and the issuance of a passport is part of the exercise of that discretion."

Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Nov. 8, 1897, For. Rel. 1897, 29.

"The Secretary of State has the right in his discretion to refuse to issue a passport, and will exercise this right towards anyone who he has reason to believe desires a passport to further an unlawful or improper purpose."

Rules Governing the Granting and Issuing of Passports in the United States, Sept. 12, 1903.

See, to the same effect, Mr. Hill, Assist. Sec. of State, to Mr. Clarke, Nov. 4, 1898, For. Rel. 1899, 88.

"As a general statement, passports are issued to all law-abiding American citizens who apply for them and comply with the rules prescribed; but it is not obligatory to issue one to every citizen who desires it, and the rejection of an application is not to be construed as per se a denial by this Department or its agents of the American citizenship of a person whose application is so rejected."

Mr. Hay, Sec. of State, to dip. & cons. officers, circular, March 27, 1899, For. Rel. 1902, 1.

Secs. 4075 and 4076, Rev. Stat., which confer on the Secretary of State authority to issue passports to citizens of the United States, are not in terms mandatory, but authorize the exercise of discretion in the discharge of the function so conferred.

Knox, At-Gen., Aug. 29, 1901, 23 Op. 509, citing the opinion of Hoar, At-Gen., June 12, 1869, 13 Op. 89, 92, and distinguishing the opinion of Taft, At-Gen., 15 Op. 117.

Attorney-General Knox, in the course of his opinion, says: "Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if one of the criminal class, an avowed anarchist for instance, were to make such application, the public interests might require that his application be denied." (23 Op. 511.)

"As your archives will show, and as you are doubtless aware, in August, 1879, this Government sent circular instructions to all our ministers abroad to request all proper assistance from the Governments to which they were accredited in suppressing the proselyting for the Mormon church. In the face of such a circular it would seem to be inconsistent to issue passports to persons who are undoubtedly Mormon emissaries, even if they are American citizens. The law as to issuing passports is permissive, not obligatory, and the decision is left with the Secretary of State, under section 4075 of the Revised Statutes. Inasmuch as polygamy is a statutory crime, proselytism with intent that the emigrants should live here in open violation of our laws would seem to be sufficient warrant for refusing a passport. But it would be well to have the fact of the applicant for the passport being a Mormon emissary, and actively engaged in proselyting, conclusively proved to your satisfaction by some kind of evidence which can be put on the files of your legation and this Department. This might be obtained, perhaps, from the police authorities or the public press in case any meetings were held for the object of inciting to emigration. It is noticed that in your report of the case you did not give the applicant's name. It would be as well to obtain in all such cases of refusal of passport application, a detailed statement from the applicant, duly signed and sworn

to, in support of his application, a copy of which can then be forwarded to this Department for its action and to refer to in case the application is renewed here."

Mr. Bayard, Sec. of State, to Mr. Magee, Nov. 3, 1885, MS. Inst. Sweden, XV. 125.

See, to the same effect, Mr. Bayard, Sec. of State, to Mr. Winchester, mln. to Switz., No. 52, June 9, 1886, For. Rel. 1886, 847.

In a later instruction to Mr. Winchester, No. 59, July 20, 1886, Mr. Bayard said: "My previous instruction is not to be understood as obliging you to issue a passport in any case in which you have strong and reasonable suspicions that the person applying for the same is a Mormon emissary." (For. Rel. 1886, 851, 852.)

For the text of the circular of 1879, see For. Rel. 1879, 11.

It is to be observed that by reason of the renunciation by the Mormon church of the practice of polygamy, the position of the Government of the United States toward the Mormons is now changed. See *infra*, § 556. The previous instructions are, however, highly important as illustrating the application of the principle of discretion.

"A passport, which is the primary form and evidence of protection given to a citizen by his government, has frequently been denied to persons residing in a foreign land, in contumacy or violation of the laws of the United States. Were Winslow [Ezra D., who, when discharged on habeas corpus in England, in 1876, fled, apparently to the Argentine Republic, and thus escaped extradition] merely an applicant for a passport, the fact that he is a contumacious fugitive from the justice of Massachusetts would be a sufficient reason for denying to him that evidence of the reciprocal duty of the law-abiding citizen and the obligation of his government."

Mr. Bayard, Sec. of State, to Mr. Hanna, mln. to Arg. Rep., No. 22, June 25, 1886, MS. Inst. Arg. Rep. XVI. 385.

In June, 1899, two women in Port Arthur wrote to Mr. Fowler, United States consul at Chefoo, requesting him to send them passports and stating that they were "tourists, stay in Port Arthur indefinite." Mr. Fowler replied that in order to secure a passport the applicant must appear in person. Subsequently, on learning that the applicants were disreputable characters who desired passports in order to remain in Port Arthur, Mr. Fowler sought instructions from the United States legation at Pekin. The legation replied that while, "as a general rule, it would hardly do to make moral character a basis for the issuance of passports," yet, in Eastern countries where certificates of citizenship stand for so much, it would not furnish passports to persons of the class to which the applicants belonged, and that when the facts were clear the consul might refuse to forward the application as well as to give travel certificates.

From this view the Department of State dissented, saying that, while the issuance of passports was discretionary, the conduct or deportment of applicants had not been made the subject of regulation; that their acts, if wrongful, were matters to be dealt with under the law of the place of sojourn; that a citizen of the United States, even when accused of crime in a foreign country, would be entitled in case of need to such certification of his status as a passport affords; that the cases, such as those of the emissaries of polygamous Mormons, in which passports were directed to be refused, were rare and related to persons whose conduct in another country was violative of the laws of the United States; that, while the Federal statutes took cognizance of questions of morality in the case of aliens immigrating or applying for citizenship, they did not reach the case of citizens returning to the United States; and that a passport should not be withheld from a bona fide citizen, unless under authority of law or of instructions and regulations made pursuant to law. The legation was therefore instructed to issue the desired passports in case the persons in question should make a proper application for them either through the consul or directly.

Mr. Conger, min. to China, to Mr. Fowler, consul at Chefoo, July 3, 1899;  
Mr. Adee, Act. Sec. of State, to Mr. Conger, min. to China, Aug. 24,  
1899: For. Rel. 1899, 185, 186.

See, contra, Mr. Cridler, Third Assist. Sec. of State, to Mr. Fowler,  
No. 100, Feb. 12, 1900, withdrawn by Department's No. 112, July 9,  
1900, as stated in Mr. Hay, Sec. of State, to Mr. Conger, No. 299,  
Nov. 22, 1900, MS. Inst. China, VI. 132.

In the case of Francis W. Putnam, a native citizen of the United States, residing in Colombia, who had served a sentence for felony on conviction by a Colombian court, it was held that a foreign conviction of crime was not a bar to an application by the party convicted for a passport, "because foreign convictions of crime are not to be regarded as extraterritorial in their operation."

Mr. Bayard, Sec. of State, to Mr. Walker, chargé, March 29, 1888, For. Rel. 1888, I. 420.

It may be observed that this technical rule with regard to the effect of foreign convictions of crime has been the subject of variant judicial decisions with reference to the credibility of witnesses. The granting of passports is, as has been seen, expressly made, by the statutes, a matter of discretion. It is to be observed that in Putnam's case the legation, although instructed as above, was not directed to issue a passport, but was directed to inquire whether the applicant had not by continuous foreign residence lost his claim to a passport.

## 2. RENUNCIATION OF ALLEGIANCE.

## § 513.

Dr. Alberto Lacayo, a native of Nicaragua, born in 1857, came to the United States in 1872, and was naturalized in 1879. In the same year he obtained a passport from the Department of State and went to Nicaragua, where he resumed his residence and entered into business as a druggist. He afterwards paid several visits to the United States, and in 1886 obtained a new passport from the Department of State. His last visit to the United States was in 1891. In January, 1893, he applied to the United States legation at Managua for a new passport. He filled up the printed form of application only partly, being unable to state that he was "domiciled in the United States" and had a "permanent residence therein." He informed the legation that he was residing with his parents in Nicaragua and intended to remain with them as long as they lived, although it was his purpose after their death to go to the United States and reside there permanently. It also appeared that during three months in 1890 he filled the office of *alcalde* of Granada, in Nicaragua. He stated that he was elected to this office "against his will." His application was referred to the Department of State. It appeared that by the constitution of Nicaragua every public official, on assuming the duties of his office, is required to take an oath "to obey and cause to be obeyed the constitution and laws;" that an *alcalde*, being a public official, takes that oath; that when the office of prefect of department suddenly becomes vacant the first *alcalde* assumes the duties of that office; that *alcaldes* are members of the municipal corporation, and that by the laws of Nicaragua "those who are not citizens cannot be municipal officers." The Department of State held: "The nature of the oath taken by Dr. Lacayo, when accepting the office of *alcalde* of Granada, appears to be conclusive against the issuance of a passport."

Mr. Gresham, Sec. of State, to Mr. Baker, min. to Nicaragua, May 17, 1893, *For. Rel.* 1893, 185. See, also, *id.* 180, 183, 184.

"I have to acknowledge the receipt of your despatch No. 633, of the 21st ultimo, relative to the application of Baron Seillière for a passport, and to inform you in reply that Marie Nicolas Raymond Seillière received passport No. 33952, November 25, 1891; that he was born in France, naturalized as an American citizen before the common pleas court of New York, November 23, 1891, immediately after which he returned to his native country.

"The question for the Department to decide is as to Mr. Seillière's bona fides in renouncing his title of nobility and acquiring American citizenship, and further as to the fixity of his purpose to make this

country his home and here fulfil the duties of good citizenship. The circumstance of his naturalization, issuance of a passport and return to France having followed in rapid succession, coupled with the loss of the documentary evidence of his citizenship, may be weighed by you in connection with such evidence as he may adduce of continued assertion of his American status during the nine years he has resided in France. As Mr. Seillière's application to you seems to have been made under the style of 'Baron,' it may be well for you to remind him that in becoming a citizen of the United States and as an indispensable condition of acquiring American nationality he had to renounce his nobiliary title, in conformity with the fourth provision of section 2165, Revised Statutes, which reads:

"Fourth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

"You should inform him that this Government recognizes the entire liberty of a naturalized alien to resume his original status, and that the intention to resume it may be inferred from the individual's voluntary acts, such as withdrawal from the jurisdiction of the United States, resumption for many years of domicile in the land of origin, and renewed use of any hereditary title or order of nobility he may have formerly possessed."

Mr. Hay, Sec. of State, to Mr. Porter, amb. to France, No. 745, March 15, 1900, MS. Inst. France XXIV. 273. See *supra*, pp. 850-853.

Frederick Knochtenhofer was born in Switzerland in 1873, came to the United States in 1893, and was naturalized in September 1899. A month afterwards he returned to his native land and took up his residence with his father. On applying for a passport as a citizen of the United States, he admitted (1) that he had not renounced his Swiss citizenship and did not intend to do so, and (2) that he intended to remain with his father and help him work the farm. The legation at Berne declined to issue a passport, and its action was approved.

Mr. Hay, Sec. of State, to Mr. Lelshman, min. to Switzerland, Dec. 12, 1899, For. Rel. 1899, 764.

Where a native of Turkey, naturalized in the United States, re-entered his native land as a Turk, and accepted a *teskêreh* as a Turkish subject, and on this ground the United States consul-general at Constantinople refused to visé the passport which he had before leaving America obtained from the Department of State, the Department said: "The circumstances of his return to Turkey bring

his case within the rule laid down by Mr. Fish (Consular Regulations, 1874, section 110): 'For a naturalized citizen may . . . by concealing . . . the fact of his naturalization and passing himself as a citizen or subject of his native country until occasion may make it his interest to ask the intervention of the country of his adoption . . . so far resume his original allegiance as to absolve the Government of his adopted country from the obligation to protect him as a citizen while he remains in his native land.'

"The Department has on several occasions held that a person naturalized here, who returns to the country of origin and passes himself as a citizen or subject of that country, has by his own act testified his renunciation of his acquired status, as he has a perfect right to do."

Mr. Adee, Second Asslt. Sec. of State, to Mr. Dickinson, No. 29, Sept. 3, 1898, 163 MS. Inst. Consuls, 508.

The United States legation at Constantinople having reported that many naturalized citizens of Turkish origin returned to Turkey with Ottoman passports, and having inquired whether such persons should be regarded as having abandoned their American citizenship and as no longer entitled to American passports, the Department of State replied "that a person receiving a Turkish passport is not entitled to receive a passport from the United States;" and that the legation "should refuse passports to all persons of Turkish origin who do not present an American passport or authenticated naturalization papers," and "should regard the possession of a Turkish passport as sufficient evidence that the holder should not receive one from the United States."

Mr. Hay, Sec. of State, to Mr. Griscom, chargé at Constantinople, Jan. 11, 1900, For. Rel. 1900, 937.

A passport will be refused to a person applying therefor while abroad when the circumstances show a purpose to reside indefinitely in a foreign country or fail to show a reasonable intention to return to the United States. It may happen that a person, to whom a passport is so refused, may, upon return to the United States, establish his right thereto in the absence of any judicial impugnment of his status.

Mr. Rockhill, Acting Sec. of State, to Mr. Terrell, min. to Turkey, April 27, 1897, For. Rel. 1897, 584.

### 3. EFFECT OF FOREIGN DOMICIL, OR RESIDENCE.

#### § 514.

"In all cases where indubitable evidence of citizenship, either native or naturalized, is presented to the legation by persons temporarily domiciled in the countries to which you are accredited, or in

transit through them, either a certificate of citizenship or a passport, as the circumstances may require, may be furnished to them by the legation. . . .

“Instances have occurred, and it is not improbable that they may again be presented, in which citizens of the United States who had resided abroad for so long a time, and had formed connections, either of a commercial or family nature, so intimate and binding as to render them, as far as they could be without a formal renunciation of their allegiance to the United States, citizens or subjects of the country in which they have been domiciled, have sought the protection of this Government, and claimed the privileges of its citizens when danger has threatened or when violence has attacked their persons or their interests. Such claims would, of course, be entitled to consideration, but the Government would require to be fully satisfied that citizenship had not at any time been disclaimed or abandoned for selfish purposes before it would feel bound to demand redress for such claimants. Interposition in such cases would be extended as a matter of grace, and not of right.”

Mr. Marcy, Sec. of State, to Mr. Peden, min. to Arg. Rep., April 10, 1856,  
MS. Inst. Arg. Rep. XV. 91.

A passport will not be granted to a naturalized citizen who may be inferred, from long residence abroad and other circumstances, to have abandoned his nationality.

Mr. Fish, Sec. of State, to Messrs. Lockwood & Post, Oct. 27, 1874, 105  
MS. Dom. Let. 3.

H. G., a naturalized citizen of the United States, had resided, at least since 1870, in Nicaragua, where he had married, had reared a family, and apparently intended to remain. In 1881 he solicited a passport for himself and his family from the American legation, as well as its interposition in a matter between him and the Nicaraguan Government concerning the duties on some imported goods. It was held that, without regard to the question of his “actual citizenship,” concerning which no opinion was expressed, his requests should not be complied with.

Mr. Blaine, Sec. of State, to Mr. Logan, No. 132, March 9, 1881, MS. Inst.  
Cent. Am. XVIII. 159.

Karl Klingenmeyer applied to the United States legation in Berlin in 1884 for a passport. He was born in Würtemberg in 1862. His father, who was also a native of that country, had been naturalized in the United States, but it was doubtful whether he had not at the time of Karl's birth renounced his American nationality. It appeared, however, that Karl Klingenmeyer had not, until the filing



of his application for a passport, claimed American citizenship; that he had no intention of making his home in the United States, and that he desired a passport in aid of his marriage in Germany. On these facts it was decided that his application should be denied.

Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, min. to Germany, Jan. 15, 1885, For. Rel. 1885, 396.

"The burden of proof is always on the applicant for the passport, and here there is no evidence to prove either his father's non-abandonment of his United States citizenship or his own election of such citizenship, save the applications of father and son for passports."

Mr. Porter, Act. Sec. of State, to Mr. Winchester, min. to Switz., Sept. 14, 1885, For. Rel. 1885, 811.

"Your dispatch, No. 63, of the 24th ultimo, has been received. . . . You formulate six points, upon which you ask the views of the Department:

"(1) For how many years may a citizen of the United States reside abroad without losing his American domicile?

"(2) Would any limit of time in this regard apply to native as well as naturalized citizens, or only to the latter?

"(3) Applicants for passports being required to state under oath the time within which they intend returning to the United States, what is the longest period of time they may fix?

"(4) If an applicant refuses to swear that he will return to the United States within a fixed time, should a passport be refused him?

"(5) Does the limit of time referred to in questions 3 and 4 apply equally to native-born and naturalized citizens?

"(6) If application is made to you for the renewal of a passport, and it appears on examination that the time has expired within which the bearer of the old passport stated his purpose of returning to the United States, and that, nevertheless, he has not been to America to resume the duties of citizenship, should a renewal of his passport be declined?

"In reply to your first question, I have to say that there is no fixed term of foreign residence by which the loss of American domicile is decided. The domicile of a person depends upon his intention, which is to be determined upon all the facts in the case. In the determination of this question no distinction is made between native and naturalized citizens, but the comparative periods of residence in this and in foreign countries are to be considered in arriving at the real intention of the individual.

"This observation answers your second question.

"From what has been said, it results that the Department is unable to fix a certain and constant period within which a person must return

to the United States. This answers your third and fourth questions, and the reply made to your second question applies also to your fifth.

"In answer to your sixth question, I have to say that where, in his application for a passport, a person makes oath that he intends to return to the United States within a certain time, and afterwards, when he applies for a renewal of his passport, it appears that he has not fulfilled that intention, this circumstance raises a doubt as to his real purposes and motives, which he may be called upon to dispel. The unfavorable presumption which he has by his own act created is not conclusive against him, but he should be asked for explanation.

"As has been stated, no distinction is made between native and naturalized citizens. But certain elements of fact may exist in the case of the latter which do not arise in the case of native citizens. For example, we will take the case of a native-born subject of a foreign power, who, having grown up under its protection and owing it allegiance, comes to the United States and immediately after acquiring naturalization returns to his country of origin to reside, claiming exemption from the burdens of its citizenship, but performing none of the duties of citizenship in the United States. To permit such a thing to be done for the purpose of evading the obligations of allegiance would be to promote a fraud under the guise of expatriation. To meet such a case we find that it has generally been provided in our treaties of naturalization that, where a citizen of one of the contracting parties, naturalized under the laws of the other, returns to his original country and resides there for two years, he may be held to have renounced his naturalization. The adverse presumption thus created may be rebutted. In deciding whether it has been, all the facts in the case must be considered together, but these facts must not be inconsistent with his resolve and his practical ability to return hither and fulfill the obligations of citizenship."

Mr. Blaine, Sec. of State, to Mr. Grant, min. to Austria-Hungary, March 25, 1890, For. Rel. 1890, 11.

That intention of permanent residence abroad deprives one of the right to a passport, see the case of Theodore Rosenberg, For. Rel. 1892, 230, 233.

S., who was "domiciled in Mexico City," where he had resided for fourteen years and followed the occupation of a jeweler, applied to the United States legation for a passport, for himself and his wife, for the purpose of a visit to Hamburg, Germany. He had obtained a passport from the legation in 1886, and in 1888 secured a Mexican certificate of American nationality. He was born in Hamburg in 1858, and claimed United States citizenship through his father, who was alleged to have been a native citizen, but who, "when a young man," left the United States and settled in Germany, of which his father, who was "thought to have been a naturalized citizen of the

United States," was a native. No evidence, however, was produced of the grandfather's naturalization or of the father's place of birth or the age when he went to Germany to live. S. himself had never resided in the United States, having been in the country only two or three times, on brief visits; and he stated "that he intended to reside in Mexico City permanently for the future." Held, that in view of the "total absence of American residence, covering the whole past and future life of the applicant and the whole life of his father from early manhood," of the fact that for "two generations neither father nor son has evinced a purpose to fulfill the duties of good citizenship," and of the failure to exhibit any "purpose of residence in the United States" in his sworn application, S. was not entitled to a passport.

Mr. Gresham, Sec. of State, to Mr. Gray, min. to Mexico, May 13, 1893,  
For. Rel. 1893, 423.

Exceptions to the rule that the applicant for a passport must produce evidence of intention to return to and reside in the United States have occasionally been made on grounds of public policy. Thus the issuance of passports has been authorized in the case of missionaries in foreign lands whose residence there was continuous and practically permanent and who could not allege any definite intention of returning to and residing in the United States. An exception has also been made in the case of agents of American business houses who are engaged in foreign lands in promoting trade with the United States.

Mr. Gresham, Sec. of State, to Mr. Runyon, ambassador to Germany,  
Nov. 1, 1894, For. Rel. 1894, 245, citing Wharton's Int. Law Digest,  
II. 369, 370.

"The language of the Porto Rican law is to be construed in its general legal sense, in which continual personal presence is not necessary to constitute continuous residence. The native of Porto Rico who makes it the place of his permanent domicile does not, therefore, lose the benefits of the act because he was temporarily abiding elsewhere when it went into effect."

Mr. Hill, Act. Sec. of State, to Mr. Lenderink, chargé in Chile, April 20,  
1901, For. Rel. 1901, 32.

"Reasons of health that render travel and return [to the United States] impossible or inexpedient are given in the circular instruction of March 27, 1899, . . . as one of the facts that may influence a favorable conclusion" on a passport application, made to a legation, by an American citizen residing abroad.

Mr. Hay, Sec. of State, to Mr. Hardy, min. to Switzerland, No. 11, June 7,  
1901, MS. Inst. Switz. III. 263.

See, also, Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switz., No. 214, Feb. 4, 1901, id. 254; Mr. Hay, Sec. of State, to Mr. Fletcher, Feb. 4, 1901, 250 MS. Dom. Let. 528.

It has been shown elsewhere that continuous residence for reasons of health in one place is not incompatible with the preservation of a domicile in another place. (Supra, § § 477, 487.)

Emile Stoltz, a native of Alsace, after obtaining naturalization in the United States, went to Switzerland, where he married and reared a family. After residing there 14 years, the United States legation at Berne refused to renew his passport and the Swiss Government threatened to expel him. It appeared that he had endeavored to acquire Swiss nationality, but was unable to find any commune that would accept him as a burgher, because of his scanty means and large family. The Swiss Government, through its minister at Washington, inquired whether the legation at Berne might not be authorized to issue him a passport. With this request the Department of State declared that it was unable to comply on the ground that "where an American citizen goes to a foreign country and settles there *animo manendi*, . . . he thereby forfeits the right to the protection of this Government and is to be considered as having expatriated himself."

Mr. Hill, Act. Sec. of State, to Mr. Ploda, Swiss min., June 14, 1901, For. Rel. 1901, 511.

Applications for passports were made to the United States legation in Japan by Alexander and Basil Powers, sons of Philip H. Powers, a native citizen of the United States, who had resided in Russia for thirty years, as agent of the firm of Walsh, Hall & Co., of Osaka and Hiogo, Japan. Alexander was 21 years old; Basil, 19. Both were born in Russia; neither of them had been in the United States. Their native language apparently was Russian, the elder not speaking English, and the younger imperfectly. They desired passports "for purposes of business" in Russia. By the Russian law persons born in Russia of alien parents may, within a year after attaining their majority, be admitted to Russian allegiance if they desire it, but in case they do not exercise the privilege they remain aliens. In the present cases, therefore, no conflict of allegiance arose, but the legation refused to grant the passports on the ground of a want of connection of the applicants with the United States. A passport was, however, issued to Philip H. Powers, which included the minor son, Basil, and two other minor children.

"Between the legal status of citizenship and the right to continued protection during indefinitely prolonged sojourn abroad, the executive authority of the United States draws a clear distinction in exercising its statutory discretion to issue passports as evidence of the right to

protection. The relation of the citizen to the state being reciprocal, embracing the duties of the individual, no less than his rights, the essential thing to be determined is the good faith with which the obligations of citizenship are fulfilled.

"The best evidence of the intention of the party to discharge the duties of a good citizen is to make the United States his home; the next best is to shape his plans so as to indicate a tolerable certainty of his returning to the United States within a reasonable time. If the declared intent to return be conspicuously negatived by the circumstances of sojourn abroad a passport may be withheld.

"Alexander Powers being now *sui juris*, his case is to be treated precisely as any other where the conduct of the applicant suggests a voluntary evasion of the obligations of American citizenship and abandonment of the conditions under which protection is properly to be granted.

"Basil Powers, the younger brother, is now 19 years of age, and therefore under parental control. It appears that it is his father's purpose to send him to Vladivostock for business purposes, thus involving his separate residence in Russia. If the facts in your knowledge indicate reasonable bona fides, there is no objection to your granting a passport to Basil during minority. On his attaining his majority his case will fall in the same category as that of his brother Alexander.

"The status of the father, Philip H. Powers, is questionable as to the continuance of a bona fide claim to protection as a native-born citizen. He appears to have resided constantly in foreign parts for at least twenty-one years; how much longer is not stated. He merely alleges a vague purpose to return to the United States with his children 'as soon as convenient to do so,' or 'when business circumstances would allow.' More positive evidence of intention to return is certainly requisite; but the facts of his business employment abroad may importantly modify this aspect of his case if the firm he serves, Walsh, Hall & Co., of Osaka and Hiogo, be the foreign branch of a business concern having its headquarters in the United States."

Mr. Adee, Acting Sec. of State, to Mr. Coombs, min. to Japan, April 28, 1893, For. Rel. 1893, 401, 402.

Two persons, father and son, applied to the legation of the United States at St. Petersburg for passports. The father went to the United States forty-two years before, and after five years' residence was naturalized. He left the United States in 1864, and afterwards resided nearly thirty years in Poland, where he evidently intended to remain. The son, who was born in Poland in 1872, had never been in the United States, although he swore in his application that he intended to "return" to the United States within two years. He

was educated at a German university and could not speak English. It was held that the father, by resuming and maintaining his domicile in the country of his original allegiance, had "conspicuously negatived" all presumption that he had preserved a right to continuous protection as a naturalized citizen. As to the son, it was held that if he should make clear his intention on attaining majority to come to the United States, he might have a passport, but not otherwise. As to other and younger children it was held that they should as minors "have the benefit of the doubt, and be secured recognition of the status of American citizenship under section 1993, Revised Statutes, until they come of age and become competent to exercise the option of domicile which belongs to them."

Mr. Gresham, Sec. of State, to Mr. White, min. to Russia, June 6, 1893, For. Rel. 1893, 543.

With this instruction Mr. Gresham annexed a copy of his No. 84, of April 28, 1893, *supra*, to the United States minister at Tokio, in regard to the passports application of Alexander and Basil Powers.

In the foregoing case, as in various other cases, where a passport has been refused to a citizen of the United States, and also to his wife, if he had one, on the ground of apparently permanent residence abroad, passports have at the same time been directed to be issued to his foreign-born children on the ground of their citizenship of the United States under § 1993, R. S.

Mr. Sherman, Sec. of State, to Mr. Breckinridge, min. to Russia, No. 403, April 20, 1897, MS. Inst. Russia, XVII. 567; same to same, No. 408, May 3, 1897, *id.* 571; Mr. Hay, Sec. of State, to Mr. Harris, min. to Aust.-Hung., No. 73, March 27, 1900, MS. Inst. Austria, IV. 465.

These cases are cited as types of a numerous class.

In the first one the applicant for a passport was a native citizen of the United States who had lived continuously in Russia since 1867—a term of thirty years. It was expressly declared that "the refusal to grant a passport does not necessarily deprive the man of his citizenship," but the children were held to be entitled to passports as "natural-born American minors," i. e., as American citizens. Their domicile, it is needless to say, was the same as their father's.

In the second case the applicant was a naturalized citizen of German origin, who had resided twenty-two years in Russia. In the third case the applicant was a widow who had lived twenty-three years abroad, and declared that she desired a passport for purposes of sojourning in Austria.

J. W. S., a native of Germany, was naturalized in the United States in 1848. In November of the same year he obtained a passport from the Department of State and went to Europe, where he apparently continued to reside, making only occasional visits to the United States. He finally settled in Berlin in 1865, and died there in 1876. During his residence in Europe he married a Prussian woman, who,

in 1883, applied to the American legation in Brussels for a passport. She resided with her husband in the United States on one occasion for six or seven months, but, when she applied for the passport, was residing in Europe, and had no intention of returning to the United States. It was held that, "under such statement of facts, and the treaty of 1868 with Germany," she was not entitled to a passport.

Mr. Frelinghuysen, Sec. of State, to Mr. Fish, No. 35, April 23, 1883,  
MS. Inst. Belg. II. 323.

In 1887 an application for a passport was made to the American legation at Vienna by Mrs. Antonia Mundé, a widow. She stated in her application that she was temporarily residing at Goritz, and that she intended to return to the United States "in about fifteen years." It appeared that her husband was a native of Saxony, who was naturalized in Massachusetts in 1854; that he went in 1866 to Bavaria and afterwards to Würtemberg, and that still later he established his residence in Switzerland, where he married the applicant. Before his death he went to Goritz and in 1885 obtained a passport from the American legation at Vienna as a citizen of the United States. On these facts the legation refused to issue Mrs. Mundé a passport. In approving this decision the Department of State remarked that it was not necessary to determine the effect of Mr. Mundé's long residence abroad upon his acquired citizenship. Assuming that he always retained the *animus revertendi*, his widow, who had never been in America, did not exhibit such evidence of an intention to come to and reside in the United States as would warrant the Department in saying that she had retained the alleged American domicile of her late husband. This was, however, the Department added, a question of evidence to be determined upon the proofs submitted, and it was not thought that those before the Department were sufficient to warrant a final decision, although, as they pointed to an Austrian rather than an American domicile, they justified the withholding of a passport without prejudice to any rights to which Mrs. Mundé might afterwards show herself to be entitled.

Mr. Bayard, Sec. of State, to Mr. Lawton, min. to Austria, July 28, 1887,  
For. Rel. 1887, 23-24. See, also, pp. 20-22.

The foreign-born wife of an American citizen, who has never been in the United States, can claim the protection of the United States only through her husband, and if, by continuous residence abroad, he abandons his right to protection and to a passport, the wife also loses her right to protection.

Mr. Sherman, Sec. of State, to Mr. Storer, min. to Belgium, Nov. 10, 1897,  
For. Rel. 1897, 31, 32.

In 1848 a native of Bohemia, named Eisenschimmel, emigrated to the United States, and in 1868 was naturalized under the name of E. Alexander. In 1872 he returned to Austria, where he resumed his original name, and where in 1874 he married an Austrian subject. He thereafter resided continuously in Vienna, engaged in business as a photographer, till 1888, when he died, leaving a widow and three children, none of whom had ever been in America. In 1899 his widow applied to the United States legation at Vienna for a passport and exhibited one which had been issued to her in 1896. It appeared that in obtaining this passport she stated that she would within two years proceed to the United States, and she gave no substantial reason for failing to do so except that she did not want to take her children, who were then respectively aged 22, 20, and 19, from their schools in Vienna. The legation refused to issue the passport, and its action was approved.

For. Rel. 1899, 75-77.

"I have to acknowledge the receipt of your No. 499, of the 20th ultimo, inclosing a copy of a letter from Mrs. L. Lassonne, appealing for a United States passport.

"You refer to the Department's No. 379, of March 15, 1897, to Mr. Breckinridge, in which the Department declined to issue a passport to Mrs. Lassonne.

"The opinion of the Department that Mrs. Lassonne was not entitled to a passport was not based on the hypothesis that she would be claimed as a Swiss citizen by Switzerland. This was merely mentioned as a suggestion that she might possibly secure a Swiss passport. The decision of the Department was based upon her abandonment of the citizenship which she acquired by her marriage to a citizen of the United States.

"I quote from the instruction:

"It appears that the applicant, being a native of Switzerland, was married in St. Petersburg in 1874 to Mr. Charles Lassonne. . . . She is now a widow. She has never been in the United States, and has no apparent intention of coming hither. . . . The only question for the Department to consider is whether, under the circumstances, Mrs. Lassonne is entitled to protection as a citizen of the United States. Mrs. Lassonne's claim can, of course, be no better than her husband's would be were he alive; and it would seem that at some time in or prior to 1874 he virtually abandoned his American residence for a European domicile. The widow's case is even weaker, for, during nearly a quarter of a century since her marriage, she has never enjoyed an American domicile."



"While the Department's sympathies are with Mrs. Lassonne, it thinks that she is not entitled to a passport as an American citizen."

Mr. Hay, Sec. of State, to Mr. Tower, amb. to Russia, Dec. 6, 1901, For. Rel. 1901, 446.

#### 4. FOREIGN RESIDENCE OF CITIZENS BY BIRTH.

##### (1) PERSONS BORN IN THE UNITED STATES.

### § 515.

"Rau, born of naturalized parentage, in Kansas, is taken to Europe while a minor, marries, and establishes himself in Switzerland; not in the country (Würtemberg) whence his father emigrated. Upon his applying to you for a passport as an American citizen, you required his definite declaration of intention to return to the United States within some certain time, basing your requirement on the ground that, under the circumstances of Rau's birth and residence during minority, his indefinite residence abroad, without evident intent to return, amounts to self-expatriation.

"The proper officers of the Department have given every attention to the case, both as reported by you, and upon the appeal and documentary evidence submitted by Mr. Rau.

"It is conceived that, in applying to his case the doctrines of *repatriation* as tantamount under the circumstances to *expatriation*, you have extended the thesis you advance of Rau's citizenship being due to his father's naturalization beyond the point where it should rightfully rest. For, while there may be rational doubt as to whether Rau is a *good* citizen of the United States, sharing alike the burdens and privileges of his fellow-citizens, he is still undoubtedly a *citizen*. Having been born here, of a naturalized father, the question of *repatriation* would not obtain in his case, even if he were permanently domiciled in Würtemberg, his father's place of nativity. The Department holds that for a native American to put off his national character he should put on another. Continued residence of a native American abroad is not *expatriation*, unless he performs acts inconsistent with his American nationality and consistent only with the formal acquirement of another nationality, and the same rule holds equally good in the case of a naturalized citizen of the United States who may reside abroad elsewhere than in the country of his original allegiance. Existing statutes confirm the principle by providing that citizenship shall flow to the children of American citizens born abroad, the birthright ceasing only with the grandchildren whose fathers have never resided in the United States. Foreign residence, even for two generations, is, therefore, not necessarily *expatriation*, in the sense of renouncing original allegiance, nor is it necessarily

repatriation unless through the conflict of laws of the respective countries and the conclusion of conventional agreements between them.

"If, therefore, Mr. Rau shall make application in the usual form, fortified by affidavit and documentary evidence of his American birth, and shall show that he has not forfeited his native allegiance by assuming another, the Department conceives that he is entitled to a passport for himself and wife.

"The application of Mr. Rau to this Department, through the Hon. J. W. Stone, M. C., of Michigan, was in the nature of an appeal from your action in his regard, coupled with a request that a passport should issue to him directly from the Department. The rule which has been enforced for some years is that 'citizens of the United States desiring to obtain passports while in a foreign country must apply to the chief diplomatic representative of the United States in that country.' There is no good reason why that rule should not be applicable now, or why action should be taken here which might imply reversal of your decision. The Department prefers to regard you as not having refused a passport to Mr. Rau, but, rather, as having, through commendable zeal in the furtherance of true American interests abroad, required of the applicant a declaration not technically necessary, either in view of his birthplace or present country of residence."

Mr. Evarts, Sec. of State, to Mr. Fish, Oct. 19, 1880. For. Rel. 1880, 960.

A. J. was born in New York, in 1847, of alien parents, his father having, however, in 1843, made a declaration of intention to become a citizen. In 1850 the father removed with his family to New Granada, but in 1859 completed his naturalization in the United States, though there was nothing to show that his New Granadian residence was interrupted. In 1866 the father removed with his family to Mexico, where A. J. continued to live and was still living when, in 1880, being then 33 years old, he sought a passport from the United States legation. He declared that he had since attaining his majority done nothing inconsistent with his native allegiance as an American citizen. The Department of State held that, while passports were issued only to citizens, there were cases in which a passport would be refused to a citizen; that the case of A. J. was one of these. "He has," said the Department of State, "resided out of the United States the greater part of his life, and according to his own statement there do not exist in regard to him now any special circumstances that render his possession of a passport any more necessary now than during any other period of his long residence abroad."

Mr. Hay, Act. Sec. of State, to Mr. Morgan, No. 86, Dec. 22, 1880, MS.  
Inst. Mex. XX. 214.

It appeared that S. B. O., who was the son of a native American residing in Liverpool, and who was registered at the United States consulate there as a citizen of the United States, was born in New Orleans, La., August 14, 1855; that he left the United States when a child and had never since been domiciled there; that for 16 years he had been in business in Brazil and had, so far as appeared, been in the United States only once, and then as a visitor, in 1889; that he held a passport issued by the United States consul at Rio de Janeiro, October 9, 1878; that he had lately sojourned temporarily in Liverpool, having no occupation there, and had since gone to seek business in Portugal; and it was stated that, "although hoping and intending ultimately to reside in the United States, the time for his return thither can not be stated even approximately." Mr. Lincoln, American minister in London, refused, Feb. 14, 1890, to issue to him a passport. Mr. Blaine, March 19, 1890, approved Mr. Lincoln's views, but instructed him that the Department of State, before rendering a decision in the case, would consider any application and statement which S. B. O. might desire to make with reference to his departure from the United States and his residence abroad.

For. Rel. 1890, 323, 331.

"I have received your dispatch No. 125, of the 21st ultimo, in relation to the application of Mr. Rudolph Nejedly for a passport as a citizen of the United States.

"The facts of the case appear as follows: The applicant was born in New York July 18, 1854, of a father whose national origin is not stated, but who, having emigrated to the United States in 1852, was naturalized October 10, 1860. The father returned to Europe in 1861, and has since resided there, doing, as far as you can learn, nothing to retain his American citizenship. It is to be inferred that Rudolph Nejedly, being then 6 years old, was taken to Europe with his father, and he declares that he has since 1861 resided in Vienna. When 18 years old, in 1872—and liable to conscription—a passport was granted to him by your predecessor, Mr. Jay. Since then the applicant has done nothing until now that would indicate a desire on his part to maintain his American citizenship. He is employed in the Savings Bank of Vienna, and you gather from his statements that he has no intention of ever returning to this country to reside. His sworn declaration is that he intends to return to the United States 'when circumstances will permit.'

"This declaration, when considered in connection with the circumstances detailed in your dispatch, is far from constituting an expression of a purpose ever to return to the United States, and is altogether unsatisfactory.

“ Moreover, as Mr. Nejedly was born in the United States of a foreign father, it is probable that the most that could under any circumstances be claimed for him is that he was born with a double allegiance. But double allegiance does not always continue when the person so endowed reaches his majority; he must make an election by taking up his residence and performing the duties of citizenship in the one country or the other. This requirement would apply with peculiar force to Mr. Nejedly, who is living in Austria, the country of which at the time of his birth his father is supposed to have been a subject.

“ This supposition the Department bases upon your statement that the circumstances indicate that Mr. Nejedly has sought the protection of the United States only for the purpose of evading the performance of the duties of citizenship in Austria and without any intention to assume the duties of citizenship in this country. However this may be, birth in this country of a foreign father, a residence of six or seven years thereafter, followed by departure with the father (who abandons the country immediately after his naturalization) and by a continuous residence abroad up to the thirty-seventh year without having returned to this country, without any identification with its interests, and without any apparent intention to come hither and assume the duties of citizenship, must be held to constitute a very slender basis for a claim to the protection of the United States. For a government, without any explanation of circumstances, to sustain a claim to protection might seem to indicate a readiness to submit to imposition upon itself, practiced for the purpose of imposition upon another government.

“ The Department can not, as at present advised, direct the issuance of a passport to Mr. Nejedly.”

Mr. Blaine, Sec. of State, to Mr. Grant, min. to Aust.-Hung., No. 110, Feb. 26, 1891, For. Rel. 1891, 16.

See a similar decision in the case of R. G. W. Tipplitt, who claimed American citizenship under § 1903, R. S. (Mr. Blaine, Sec. of State, to Mr. Grant, min. to Aust.-Hung., No. 179, Jan. 25, 1892, For. Rel. 1892, 6.)

See, as to the case of Rudolph Ernest Brilmow, Mr. Ades, Act. Sec. of State, to Mr. Lincoln, min. to England, No. 70, Aug. 31, 1889, For. Rel. 1889, 460.

In 1894 Mr. Thompson, the American minister at Rio de Janeiro, declined to issue passports to six native American citizens, on the ground that they had continuously resided twenty-seven years in Brazil, and had no apparent intention of returning to the United States. The action of Mr. Thompson was approved.

Mr. Uhl, Act. Sec. of State, to Mr. Thompson, min. to Brazil, No. 137, May 31, 1894, MS. Inst. Brazil, XVIII. 58.

It appeared that of the six persons in question two were natives of Alabama and two of Georgia, while one was a native of Louisiana and one of Tennessee. In approving the refusal to issue them passports, Mr. Uhl said: "The refusal of the passport would not necessarily imply a refusal to intervene in case of their being drafted into the Brazilian army. Each case should, in such contingency, be decided on its special merit."

"The Department has received your No. 10 of July 10, 1901, submitting the application for a passport of Carl Schimanek, and a presentation of his case by Consul Donzelman at Prague, who thinks the applicant is not entitled to protection as a citizen of the United States. It appears that he was born here; that his father had declared his intention of becoming a citizen of the United States before the son's birth, but died before he secured naturalization; that the mother never secured naturalization as a citizen of the United States, and returned to Bohemia with the applicant when he was four years of age, and that he has himself never been in the United States since. He does not speak English, has married a Bohemian, is engaged in local business, and, as it would seem, is permanently settled in Bohemia. In considering the case, the question of the citizenship of the applicant's parents is not material, as Consul Donzelman seems to think it is, because birth in the United States of itself confers United States citizenship under the provisions of our laws. In construing these provisions the legation has correctly followed the numerous rulings on the subject by this Department (see *The American Passport*, pp. 102, 104, 105), and the rulings are themselves in full consonance with the decisions of the Federal courts. (See notably 35 Fed. Rep., 354, and 169 U. S., 649.) If, therefore, the applicant were still in his minority, or were only temporarily abroad, there would be no doubt of his being entitled to the protection of a passport as a native citizen of the United States. The question really involved, however, is whether or not he has abandoned his right to that protection. The Department's circular instruction of March 27, 1899, on the subject of 'Passports for persons residing or sojourning abroad,' contained the following quotation from Secretary Fish:

"'When a person *who has attained his majority* removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there *animo manendi*, and it lies with him to explain it.'

“ Obviously, these remarks apply with equal force to one who remains in a foreign country after he has attained his majority. The circular further says:

“ ‘ When an applicant has completely severed his relations with the United States; has neither kindred nor property here; has married and established a home in a foreign land; has engaged in business or professional pursuits wholly in foreign countries; has so shaped his plans as to make it impossible or improbable that they will ever include a domicile in this country—these and similar circumstances should exercise an adverse influence in determining the question whether or not a passport should issue.’

“ Each circumstance quoted above appears to be applicable to Mr. Schimanek, with the additional fact that in applying for the passport issued him by your legation August 4, 1894, he swore that he intended to return to the United States, which he has not done, and in his pending application he makes the same promise, which there is strong reason for believing he will not keep. The circular also says:

“ ‘ If, in making application for a passport, he (the applicant) swears that he intends to return to the United States within a given period, and afterwards, in applying for a renewal of his passport, it appears that he did not fulfill his intention, this circumstance awakens a doubt as to his real purpose which he must dispel.’

“ So far from the doubt having been dispelled in this case, it appears to have been confirmed. The Department is therefore of the opinion that, there being no additional facts to change the aspect of the case, Mr. Schimanek’s application for a passport should not be granted and the applicant informed that he must renew his residence in the United States which was abandoned in his infancy, before he can expect to receive the protection of this Government while he is abroad.”

Mr. Hay, Sec. of State, to Mr. Herdliska, chargé at Vienna, Aug. 20 1901, For. Rel. 1901, 13.

See, also, Mr. Adee, Acting Sec. of State, to Mr. Combs, min. to Guatemala, No. 71, Sept. 15, 1903, For. Rel. 1903, 595.

For further quotations from the circular of March 27, 1899, see *infra*, § 517.

(2) PERSONS BORN ABROAD.

§ 516.

John Pepin, a Frenchman by birth, emigrated when a young man to the United States, and became a naturalized citizen. In 1850 he returned to France, where he married a French woman, by whom he had two children, a daughter and a son. He never returned to the United States to live. At his death he left some property at New Orleans, which his family continued to hold. In 1873 the widow ap-

plied to the American legation in Paris for a passport for her son, who was then eighteen years of age. It appeared that she had visited the United States two years before with her daughter, and had obtained a passport from the Department of State as an American citizen; and she stated that her son had once obtained a passport from the American legation in London, but had lost it. He had never been in the United States. It was held that he exhibited none of the "*indicia* necessary to show an intent on his part to assume the duties of citizenship as well as the privileges granted by the act of 1855" (10 Stat. 604); that were it not for his desire to avoid the performance of duties required by French law, he probably would not have asserted American citizenship; and that there was a presumption of a purpose of expatriation so strong that, unless it could be rebutted to the legation's satisfaction, he would not be entitled to the legation's protection against the operation of the laws of the country.

Mr. Fish, Sec. of State, to Mr. Washburne, min. to France, June 28, 1873, For. Rel. 1873, I. 256, 260-261.

H. K. was born in Mexico in 1855, after his father, a naturalized citizen of the United States, had removed to that country. H. K., so far as he could recollect, had never been in the United States. His permanent abode was London, England; he had no connection with any American interest, and he had no intention to settle in the United States or to assume the duties and responsibilities of American citizenship. He had once obtained a passport as a citizen of the United States, but it was cancelled by the legation of the United States in London because it was over two years old. The Department of State refused to instruct the legation to issue a new passport.

Mr. Bayard, Sec. of State, to Mr. White, chargé, March 5, 1880, For. Rel. 1880, 449; Mr. Wharton, Assist. Sec. of State, to Mr. Keller, May 3, 1880, 172 MS. Dom. Let. 650.

"I have to acknowledge the receipt of your No. 10 of October 3d last, in which you transmit an application of Dr. Julius Altschul for a passport, together with affidavits of the applicant and other persons in regard to the good faith of his residence abroad and of his intention to come to the United States upon the completion of the studies which he is now pursuing in a chemical laboratory at Grumau near Berlin.

"In this relation it is proper to recapitulate the facts in the case. Julius Altschul was born in London, Nov. 3, 1864. His father, Sigmund Altschul, an Austrian subject by birth, came to the United States in 1848. In 1854 he was naturalized and went abroad and never afterwards returned to the United States. Up to March, 1889, he was from time to time granted passports as a citizen of the United

States by various legations, and in April last he died, while an application to your legation for another passport was still pending.

"It is clear, therefore, that when Julius Altschul was born his father was regarded by this Government as one of its citizens. Section 2172 of the Revised Statutes provides that 'the children of persons who are now, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof.' Under this provision Julius Altschul was born with a title to American citizenship. Being born out of the United States, he might also have been subject to the claims of another government, if his birth within its jurisdiction made him a citizen under its laws. But no such claim has been made and consequently no conflict of allegiance is presented. Nor does there appear to be any ground whatever for any claim of allegiance by the German Government, within whose jurisdiction Julius Altschul now is, and in which he proposes to remain until he comes to the United States.

"Under these circumstances, it is thought that the papers and affidavits now presented to the Department disclose a reasonable explanation of Julius Altschul's present residence in Germany and of his proposed temporary residence there for the next few years consistent with his declaration of continued allegiance to this country.

"You are therefore instructed to grant him a passport, but to make such a record as will bring the circumstances of the case before the legation, should an application be made by him for another passport in the future."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, No. 32, Dec. 14, 1889, MS. Inst. Germany, XVIII. 275.

"I have to acknowledge the receipt of your No. 35 of the 14th ultimo, in which you transmit an application of Arthur Altschul for a passport.

"He was born at Dresden, Saxony, June 16, 1866, and is now twenty-three years of age. His father, Sigmund Altschul, an Austrian subject by birth, came to the United States in 1848. . . . Arthur Altschul still resides in Dresden, though he is at present temporarily in Berlin. In 1887, just after attaining his majority, he received a passport as a citizen of the United States from the legation at Berlin. Two years having expired, he wishes this passport renewed, for the purpose of enabling him to reside as an American citizen in Germany in order that he may complete certain philological studies, which he is pursuing with reference to teaching in the United States. In support of his application he submits affidavits of himself and other persons to show that he is acting in good faith, and proposes to come to the United States upon the completion of his studies. He



states that he has lately taken the degree of Ph. D. at the University of Leipzig. Section 2172 of the Revised Statutes provides that 'the children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof.' Under this section, Arthur Altschul was born with a title to American citizenship. But it by no means follows that he may not, by reason of having been born out of the limits and jurisdiction of the United States, or by reason of subsequent acts of himself or of his parents, have become subject to the claims of another government. In such case it is the doctrine of this Government that a person may be possessed of a double allegiance, and that upon attaining his majority it is necessary for him to elect which he will exclusively adopt. He is not permitted to retain both, and by so doing to use one for the purpose of evading his duties to the other, or to both. It has been suggested to the Department that, unless this Government recognizes the American citizenship of Arthur Altschul, he may be liable to the claims of the German Government, within whose jurisdiction he was born and still lives. It has, however, repeatedly been held, upon the maturest consideration of the law, that the protection of this Government can not be employed for the purpose of enabling a person to escape his obligations to a government to which he owes valid allegiance, and that, in the case of double allegiance, a passport should not be granted by one of the governments to which allegiance is due in order that the applicant may, while continuing to reside within the jurisdiction of the other, be exempt from its claims. This principle was laid down in 1869 in the case of certain persons residing in Curaçao (13 Op. Att. Genl. p. 89; Hoar, Attorney General) and again in 1875 in the case of one Steinkauler, in Prussia (15 Op. Att. Genl. p. 15, Williams,<sup>a</sup> At. Genl.) and has since been uniformly followed.

"In the present case, however, it is stated that under the laws of Germany that Government has no claim upon the applicant. This statement is sustained by the fact that no such claim has ever been made. This being so, the granting of a passport would merely serve the purpose of enabling the applicant to reside in Germany as an American citizen until the accomplishment of his studies and of his design to come to the United States. Under these circumstances it is proper to issue the passport. But in so doing it is to be understood that it is not granted and can not be permitted to be used either for escaping [claims] on the part of the German Government or for permanent residence abroad."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, No. 33, Dec. 14, 1889, MS. Inst. Germany, XVIII. 277.

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<sup>a</sup> The opinion here cited was given by Attorney-General Pierrepont.

"Your despatch No. 445, of the 12th instant, in relation to the applications for passports made by Mr. Camilo Ponce de Leon and his two sisters, has been received.

"The applicants are stated to be children of J. M. Ponce de Leon, who it is said was of Cuban origin, and was naturalized as a citizen of the United States prior to the birth of the children. It is presumed that their father is Mr. José Manuel Ponce de Leon, a naturalized Cuban, well known to the Department by reason of the claims advanced by him against the Government of Spain for injuries during the Cuban insurrection. This Mr. Ponce de Leon is of record here as having been naturalized before the court of common pleas of New York City on May 25, 1855. Several passports have been issued to him from time to time, and no doubt has arisen here as to his bona fide retention of American citizenship. Assuming the point of identity, there is no question that the three applicants were born citizens of the United States. They all appear to have been born at Cardenas, in the island of Cuba: Eugenia, on November 5, 1859; Maria de los Angeles, on August 13, 1863; and Camilo on December 11, 1864. They are therefore, respectively now, 31, 28, and 26 years old. How much of their minority was passed in the United States does not appear. They aver having left the United States in April, 1870, and since then would appear to have resided in France. The present applications for passports would seem to be the first made by them—a fact perhaps to be accounted for by the circumstance of living in a country other than that of paternal origin, and the absence of ground for allegation of any claim to their allegiance on the part of France.

"The Department has recently had occasion to instruct you in regard to somewhat analogous cases, where a minor, who, by birth in a place or of a certain parentage, in the regular way of gaining citizenship, is invested with the status of an American citizen, attains legal age in a foreign country. The present cases, however, differ from that of John Maurice Hubbard, which formed the subject of the Department's No. 353, of the 30th ultimo, in that these three persons, not having been born in France, appear not to have been called upon to declare their option of American citizenship within the year succeeding their coming of age. As regards their relation to the Government whose citizenship they claim, the similarity is sufficient to cause their cases to be gauged by the same rule of reciprocal performance of the duties of citizenship and obligation of protection while the parties remain abroad. Their cases are, therefore, to be determined on precisely the same footing as those of native citizens whose long domicile abroad and absence of definite intention to return, create a presumption of voluntary abandonment of claim to protection.

"Your course in respect to these applications is judicious. The future intention of the applicants should distinctly appear, and not be evidently negatived by the circumstances of their continued sojourn abroad, before you would be justified in granting passports to them."

Mr. Blaine, Sec. of State, to Mr. Reid, min. to France, No. 369, Nov. 27, 1891, MS. Inst. France, XXII. 255.

For the case of John Maurice Hubbard, see *supra*, § 501.

"Mrs. Emily Jane Smith . . . was born at Vladivostok, Russia, in November, 1864, and was married in 1884, before the U. S. consul at Nagasaki, Japan, to Mr. Oscar Fitzallen Smith, a citizen of the United States, who died at Vladivostok in 1889. Her father, born in New York in 1835, is now dead, as is also her mother. Mrs. Smith states that since her marriage in 1884 she has resided at Vladivostok and at Yokohama, Japan, and that she desires a passport for use in traveling in Europe. She is about to marry a Russian at Marseilles.

"It thus appears that this lady, born abroad of a native American father, who appears to have permanently abandoned the United States, and married to another native citizen who seems likewise to have relinquished his original domicile, and who has herself never been in the country of which she claims protection as a citizen, has no intention of ever coming to the United States, and her object in asking the passport is to enable her to go to France, there to marry a Russian subject.

"Under these circumstances Mrs. Smith's claim to protection as one who bona fide conserves American citizenship is too intangible to warrant the issuance of a passport."

Mr. Adee, Acting Sec. of State, to Mr. Dun, min. to Japan, July 26, 1893, For. Rel. 1893, 405.

To the same effect, in relation to the same case, is Mr. Adee, Act. Sec. of State, to Miss Crosby, July 27, 1893, 193 MS. Dom. Let. 16.

"The applicants, Antoine Phelps and Emanuel Phelps, are stated by you to be, respectively, 34 and 30 years of age, both having been born in Hayti of American parents who went thither in 1824. Neither of them was registered at the time of birth, or has at any time been in the United States, or has shown since attaining majority any purpose to come hither. The only evidence they present of their American character is a certificate, given by your predecessor, Mr. Hollister, in 1869, to one Pierre Phelps, whose relationship to the applicants is not stated, while their present application appears to be for some form of permit which will enable them to continue to reside in Hayti exempt from all burdens of such residence. Under

the reported circumstances you are not authorized to grant to the persons named a passport, which, as you correctly suggest, is the only certificate of citizenship which you are authorized to grant in any case."

Mr. Hay, Sec. of State, to Mr. Powell, min. to Hayti, Sept. 2, 1899, For. Rel. 1899, 400.

#### 5. FOREIGN RESIDENCE OF NATURALIZED CITIZENS.

##### (1) IN COUNTRY OF ORIGIN.

#### § 517.

"You complain of the action of Mr. Czopkay, U. S. consul at Bucharest, in taking away the passport of yourself and son. The true intent of our naturalization laws is that the rights and duties of naturalized citizens should be reciprocal. This Government can not continue its protection to those who have sought naturalization in the United States for the purpose, by an immediate return after naturalization to their native country, of evading their obligations both to this Government and that of their former allegiance. While conferring its protection, the Government should not be deprived of the services and industry of its citizens, and it would be unjust to the Government under which such citizens have taken up a permanent residence to deprive it of the same. A long continued and permanent residence abroad, especially of naturalized citizens in the land of their nativity, is *prima facie* evidence of an intention on their part to relinquish the rights as well as the obligations of American citizens.

"Our representatives abroad are instructed to inquire into the circumstances of each case of this character, and to use their best discretion in the action taken by them."

Mr. Seward, Sec. of State, to Dr. Chernbuck (Hospital Coltea, Bucharest, Turkey), Aug. 25, 1868, 79 MS. Dom. Let. 261.

A naturalized citizen of the United States who returns to his country of origin, and there marries, settles, and remains twenty years, is not entitled to a passport as a citizen of the United States.

Mr. Blaine, Sec. of State, to Mr. Kasson, Mar. 31, 1881, MS. Inst. Austria, III. 145.

When an Austrian subject, after being naturalized in the United States, returns to his country of origin on a passport dated June 17, 1881, and there resides four years, and then applies for a new passport, such passport "ought not to be granted without proof that this residence was meant by him to be temporary and exceptional," and in

such case it would be proper that the applicant should be personally examined.

Mr. Bayard, Sec. of State, to Mr. Lee, chargé, No. 11. Oct. 2, 1885, MS Inst. Austria-Hung. III. 363.

L., a Hungarian by birth, emigrated to the United States during the political disturbances in Hungary in 1849-1850, and was duly naturalized. He lived in the United States sixteen years, and then returned to Hungary, where, after twenty years of uninterrupted residence, with apparently permanent employment, he applied for a passport as a citizen of the United States. His domestic relations were established in Hungary and his children were born there. On these facts, it was held that he presumptively was domiciled in Hungary, and that, so long as this presumption was not rebutted, he could not obtain a passport averring him to be entitled to the immunities of a citizen of the United States.

Mr. Bayard, Sec. of State, to Mr. Lee, chargé at Vienna, July 12, 1887. For Rel. 1887, 23.

Sigismund Löwinsohn was born in Pressburg, Hungary, in 1851. In 1866 he came to the United States, and, in 1872, on the day on which he attained his majority, was naturalized. In the same month he left the United States, and a few weeks later settled in Vienna, where he continued to reside, where he married and reared a family, and where he was engaged in a lucrative business. In 1887, being desirous of "registering the birth of a child," he applied to the American legation for a passport, but refused to make any definite statement as to the time of his return to the United States. Held, that a passport was properly refused.

Mr. Bayard, Sec. of State, to Mr. Lawton, min. to Aust.-Hung., No. 14. Dec. 5, 1887, For. Rel. 1888, I. 20.

"In the case of Mr. Felix Poyard, reported in your No. 633 of the 6th instant, a settled and continuous residence of thirty years in France, the country of his origin, to which he had voluntarily returned, and where he had made his domicil, would seem in all reason to have indicated his abandonment of his acquired American citizenship, unless satisfactorily rebutted by proof of special countervailing circumstances. In that long period it does not appear that he had performed any duty of an American citizen, although during a portion of the time the resources of the country were strained to the utmost; and yet, by a vague oral declaration of his intention at some future time to return here, he is to be held entitled to all the privileges and protection for which he has not rendered the slightest equivalent.

"In all such cases I hold that very strict inquiry shall be instituted, and if the French domicil has been established, and the usual evidence of a continuing intent to live and die in that country is found, then there can be no pretext for certifying, by means of an American passport, a correlative allegiance and protection which do not exist. . . .

"It must not be forgotten that in such cases it is always in the power of the applicant, by a return to the United States, or by the performance of some act affirmative of citizenship in this country, to relieve his case of doubt.

"Neglect of rights and duties often involves loss, but the maxim applies in respect of rights of citizenship as much as to other rights—*'vigilantibus non dormientibus subrenient jura.'*"

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, July 20, 1888, For. Rel. 1888, I. 551.

Solomon H. Ulmer, a native of Bavaria, came to the United States in 1846, when 27 years of age. He was naturalized in 1853. In 1858 he returned to Bavaria, where he thereafter continued to reside. In 1888 he applied for a passport to include his son, a native of Germany, then 19 years of age, and subject to call for military service, who, it was alleged, proposed to come to the United States "in the course of one or two years." It was held that upon the facts stated Mr. Ulmer had long since renounced his naturalization, under the terms of the treaty with Bavaria, and that he was not entitled to a passport.

Mr. Bayard, Sec. of State, to Mr. Coleman, chargé at Berlin, December 4, 1888, For. Rel. 1888, I. 661.

J——— W———, a native of Russia, came to the United States in 1875, was naturalized in 1881, and three months later returned to Russia, where he settled down as a farmer. Referring to the possibility of his applying for a renewal of his passport, the Department of State said: "He resided in the United States only a little more than the period required for completing his naturalization. Out of a life of 55 years he has spent only a little over 5 in this country. Already the period of his residence in Russia since he returned thither amounts to almost twice the whole aggregate of his residence in the United States. In an opinion given by the Attorney-General of the United States on August 20, 1873, there is the following passage: 'Naturalization effected in the United States without an intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities that would otherwise attach to the naturalized person, ought to be treated by the Government of the United States as fraud-

ulent, and as imposing upon it no obligation to protect such person, and as to this, the executive must judge from all the circumstances of the case.' This opinion seems to be directly applicable to the case of J—— W——."

Mr. Blaine, Sec. of State, to Mr. Smith, mln. to Russia, No. 79, Feb. 28, 1891, MS. Inst. Russia, XVI. 696.

The fact that a person lived but a short time in the United States after his naturalization, and that he had since resided for a period of twenty years in the country of his origin, "seems to require proof of *bona fide* conservation of his American status beyond his general statement of an intent to return to this country within two years for the purpose of fulfilling the obligations assumed by his naturalization."

Mr. Wharton, Acting Sec. of State, to Mr. White, mln. to Russia, March 2, 1893, For. Rel. 1893, 537.

"This Government does not discriminate between native-born and naturalized citizens in according them protection while they are abroad, equality of treatment being required by the laws of the United States (Secs. 1999 and 2000 R. S.). But in determining the question of conservation of American citizenship and the right to receive a passport, it is only reasonable to take into account the purpose for which the citizenship is obtained. A naturalized citizen who returns to the country of his origin and there resides without any tangible manifestation of an intention to return to the United States may therefore generally be assumed to have lost the right to receive the protection of the United States. His naturalization in the United States can not be used as a cloak to protect him from obligations to the country of his origin while he performs none of the duties of citizenship to the country which naturalized him. The statements of loyalty to this Government which he may make are contradicted by the circumstance of his residence, and are open to the suspicion of being influenced by the advantages he derives by avoiding the performance of the duties of citizenship to any country. It is not to be understood by this that naturalized American citizens returning to the country of their origin are to be refused the protection of a passport. On the contrary, full protection should be accorded to them, until they manifest an effectual abandonment of their residence and domicile in the United States."

Mr. Hay, Sec. of State, to U. S. dip. & cons. officers, Circular, March 27, 1899, For. Rel. 1902, 1.

## (2) IN THIRD COUNTRY.

## § 518.

With regard to the passport application of a naturalized citizen of the United States who went abroad immediately after his naturalization and had resided in Russia for fifteen years, the Department of State said: "There are two points in Mr. W——'s favor. Being a Prussian by origin, the Government of Russia has no claim to his natural allegiance, and the presumption of bad faith which would spring from his immediate return to and indefinite residence in the country of his nativity is wanting." The Department of State, however, declined to direct the issuance to him of a passport upon his statement that he desired it for further residence in Russia and intended to return to the United States "as soon as circumstances will allow."

Mr. Blaine, Sec. of State, to Mr. Smith, min. to Russia, No. 63, Dec. 3, 1890, MS. Inst. Russia, XVI. 675. See, also, same to same, No. 85, March 19, 1891, id. 700, below.

M. F. W. was born in Prussia in 1847, came to the United States in 1869, and was naturalized in 1874. He immediately afterwards left the United States and appeared to have taken up his residence in Russia, where he had resided since 1875. In 1890 he applied to the American legation for a passport, stating that he desired it for the purpose of further residence in Russia, and that it was his intention to return to the United States "as soon as circumstances allow." It appeared that he was cashier and bookkeeper to a German firm and was a single man. It was held that on the facts stated he was not entitled to a passport, and that he should communicate to the Department of State the reasons, if any, why a new passport should be issued to him. In the course of its instructions, the Department of State said: "The laws of the United States unquestionably contemplate a permanent residence of the naturalized person in this country. It is true that circumstances may require his absence, precisely as they may require the absence of a native-born citizen. On the other hand, naturalization acquired with a view to live permanently abroad under the protection of the United States is not *bona fide* and should not be treated as valid. The requirement of a five years' uninterrupted residence in this country, prior to the act of naturalization, is not understood to constitute a complete discharge of all obligations to this country, and to absolve the person who has so resided from the performance of any subsequent act of allegiance."

Mr. Blaine, Sec. of State, to Mr. Smith, min. to Russia, No. 85, March 19, 1891, MS. Inst. Russia, XVI. 700. See, also, same to same, No. 63, Dec. 3, 1890, id. 675, *supra*.



L., a native of Hamburg, emigrated to the United States in 1862, when 17 years of age, and resided there till 1868, when, having become naturalized, he went to Russia where he had since uninterruptedly resided. As to his future residence, he merely stated that he intended to return to the United States "when able to." It was held that this statement was "altogether too indefinite to be entitled to serious consideration," and that when his alleged intention to come to the United States was "corroborated by the fact of his acquiring a residence or domicile here, which shall appear to be in good faith," it would "then be proper to consider his claims for the issuance of a passport."

Mr. Gresham. Sec. of State, to Mr. White, min. to Russia, March 24, 1893, For. Rel. 1893, 538.

A. G., a native of Russia, emigrated to the United States in 1889. He was naturalized July 24, 1894, and four months later left the United States, taking with him a passport issued by the Department of State. He apparently went directly to Hamburg, where he entered his brother's bank, in which he was still employed. His purpose of "continued indefinite residence" in Hamburg being stated in his application, it was held that a passport was properly denied him.

Mr. Olney. Sec. of State, to Mr. Silberman, Nov. 6, 1896, 213 MS. Dom. Let. 595.

#### G. STATEMENT AS TO INTENTION TO RETURN.

#### § 519.

In the general instructions in regard to passports, issued by the Department of State May 1, 1886,<sup>a</sup> it was directed that a naturalized citizen applying abroad for a passport must state under oath that his absence since his naturalization had been "such as not to work an abandonment of his nationality" and that he expected "to return to the United States as his domicile and final abode." The statement of a definite intention as to return to the United States soon began to be exacted of all applicants for passports—of native as well as of naturalized citizens, and of applicants for passports in the United States as well as abroad; and a clause was inserted in the forms of application to the effect that "I [the applicant] intend to return to the

<sup>a</sup> As has heretofore been pointed out, *supra*, § 503, these instructions are printed in Wharton's Int. Law Dig. II. 469, but do not appear to be now of record in the Department of State.

United States ———, with the purpose of residing and performing the duties of citizenship therein.”<sup>a</sup>

This addition to previous requirements perhaps may be ascribed to the temporary influence, which has heretofore been noticed,<sup>b</sup> of the suggestion that the conception of domicile might be so enlarged as to comprehend political as well as civil relations and supplement if not overshadow citizenship as the test of nationality. But, although the suggestion itself soon fell into desuetude, it produced certain indirect results, some of which, even if perpetuated by force of citation, may be supported on other grounds. Since the requirement of a definite statement as to return was established, it has naturally formed the pivot on which the question of the effect of foreign residence has turned.

Moritz Philipp Emden was born in Germany in 1826, emigrated to the United States in 1849, and was naturalized in June, 1854. In the following October he obtained a passport from the Department of State, and in November sailed for Europe. He returned to the United States in 1856 and remained till January, 1859, when he again went to Europe, where, with the exception of a few brief visits, all prior to 1863, he afterwards resided. In 1881 Mr. Nicholas Fish, then American chargé d'affaires at Berne, declined to renew his passport, and his action was approved by Mr. Blaine, who was then Secretary of State. The case continued to form the subject of correspondence till January, 1883, when instructions were obtained from Mr. Frelinghuysen to Mr. Cramer, then American chargé d'affaires at Berne, directing the issuance of a passport to Mr. Emden, to embrace both him and his wife and his two minor children. Mr. Cramer renewed this passport in February, 1885, but declined to include in it Mr. Emden's two sons, who had then attained their majority. In 1887 Mr. Winchester, then American minister at Berne, declined to grant another renewal of Mr. Emden's passport. Mr. Winchester's action was based largely upon the ground that the only declaration made by Mr. Emden with regard to his return was that he intended to return “whenever business requires my presence.” In approving Mr. Winchester's action, the Department of State said: “The Department expects that its agents abroad, to whose discretion the issuance of passports is confided, will exact unequivocal declaration of a positive intent to return to the United States, there to continue the domicile contemplated by the statute and regulations. Business visits to the United States are not evidence of domiciliary intent any more than business trips of

<sup>a</sup> See passport circular of Aug. 20, 1888, and the accompanying forms and regulations, For. Rel. 1888, II. 1662.

<sup>b</sup> *Supra*, § 491.

American citizens to foreign countries evince an intent to reside there."

Mr. Blaine, Sec. of State, to Mr. Fish, No. 203, April 1, 1881, MS. Inst. Switzerland, II. 84; Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, chargé at Berne, No. 19, Jan. 12, 1883, id. 162; Mr. Winchester to Mr. Bayard, April 21, 1887, For. Rel. 1887, 1063; Mr. Bayard to Mr. Winchester, May 7, 1887, id. 1065.

A. C. A. Cranz applied to the American legation at Brussels, in 1886, for a passport. It appeared that he was born in Germany in April, 1860; that he emigrated to America in September, 1877; that he was naturalized in Boston in 1882; that he last left the United States in December, 1883, and that in 1884 he was temporarily residing at Brussels. His father lived in Austria, of which country he was a subject, and the son was associated with him in business. In his passport application Mr. Cranz declared that he had no intention to return to the United States to reside, though possibly he might at some time make a visit there, and that he desired the passport for the purpose of residing in Europe. The refusal to issue him a passport was approved.

Mr. Bayard, Sec. of State, to Mr. Tree, min. to Brussels, April 9, 1886, For. Rel. 1886, 27.

A native of Prussia, born about 1820, emigrated to the United States in 1857, and was naturalized in 1865. He returned to Europe in 1871 and was still residing there when, in 1887, he applied to the American legation at Brussels for a passport. In his application he declared that he was temporarily residing at Brussels, but that he had "no fixed intention" of returning to the United States; that his return would "depend on circumstances." The legation declined to issue a passport and its action was approved, on the ground that the applicant had been absent from the United States for sixteen years and had no fixed intention of returning at any time in the future.

Mr. Bayard, Sec. of State, to Mr. Tree, min. to Belgium, April 13, 1887, in reply to Mr. Tree's No. 224, of March 28, 1887, For. Rel. 1887, 34, 38.

As to the abuse of American naturalization by persons maintaining a permanent foreign residence, see Mr. Tree to Mr. Bayard, April 8, 1887, For. Rel. 1887, 37.

A passport should be "refused to a naturalized citizen residing abroad who has no intention at present of returning to the United States, and who is unable to state whether he will do so or not, or when he may do so."

Mr. Bayard, Sec. of State, to Mr. Vignaud, chargé at Paris, June 13, 1888, For. Rel. 1888, I. 542.

"Persons who have no intention of ever returning to the United States, or, what is the same thing, who do not know their own minds on the subject, are not, as you have been already instructed, entitled to the evidence of protection by the United States which is afforded by a passport. On the other hand, those who can not name a precise date for their return are not necessarily to be denied the possession of such evidence, for a distinction, which should be carefully borne in mind, exists between a fixed intention to return and an intention to return at a fixed date. The existence of the former state of mind must be established by competent evidence, to your satisfaction, before you may issue a passport; the existence of the latter intention is merely cumulative evidence on the point. . . .

"It is not to be understood that the Department in so instructing you intends to introduce any novel doctrines or to extend its instructions in any respect beyond the precise point involved—the issuance of passports by our legations abroad. While resolute in claiming for domicil all the rights attached to it by the law of nations, this Department is equally resolute in insisting that the term 'domicil' should not be enlarged so as to make it convertible with 'residence.' Important reasons may be assigned for this, which will at once suggest themselves to you."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Oct. 29, 1888,  
For. Rel. 1888, I. 561.

Mr. Frank R. Blackinton, a native citizen of the United States, applied to the American legation in Paris for a passport. He was born in 1851, and left the United States in 1871, since which time he had generally resided abroad. It appeared, however, that he had in eighteen years been nine times in the United States, remaining for a few months at a time; and he deposed that his domicil was in the United States, and his legal residence in Massachusetts, where he had always paid real and personal taxes. So far as these facts were concerned, they were declared by the Department of State to indicate that he was entitled to a passport, but, when required to fill up that part of the application declaring an intention to return to the United States with the purpose of residing and performing the duties of citizenship therein, Mr. Blackinton replied "that at present I have no plan, intention, or desire to do so." In view of this declaration, the Department of State said: "The Department finds itself unable to direct favorable action upon Mr. Blackinton's application. If the Department had been left to gather this intention from antecedent facts, it would have come to a different conclusion, although no positive statement as to his future residence in the United States had been made; but it is superfluous to say that it is not admissible to resort to such inference to attribute to a person an intention to per-

form the duties of citizenship in the future, when he declares that he has neither intention nor desire to do so."

Mr. Blaine, Sec. of State, to Mr. Reid, min. to France, No. 76, Dec. 2, 1889, For. Rel. 1889, 168.

See the similar case of H. C. Quinby, For. Rel. 1890, 335, 342.

"It is not the purpose of the Department to require in all cases a certain statement as to the time at which an applicant for a passport intends to return to the United States. Various cases are conceivable in which it would be impossible to make such a statement in good faith, but in which the residence abroad would be entirely compatible with the retention of allegiance to the United States. The important object is, so far as possible, to ascertain the actual intention of the applicant, and for this purpose the statement made by him on the subject of return is not the only—and often not the most satisfactory—source of information. It is not difficult to conceive of cases the circumstances of which would clearly forbid the extension of protection to an applicant, although his declarations of allegiance and of intention to perform the duties of citizenship were strong and unqualified. His whole previous course of conduct might conclusively negative such a pretension. On the other hand, the good faith of the applicant and his right to protection might be clear, notwithstanding that he was unable to say that he would return to the United States at a certain day. But, where no such statement is made, the reasons for the omission should appear. The omission is one that requires explanation, and under some circumstances the excuse would have to be established by stronger evidence than under others. For example, a youth approaching the age when he will be liable to perform military service, leaves his native country and comes to the United States and is naturalized. Immediately after his naturalization he returns to the country of his origin, and, when asked to declare his intention in respect to return to the country of his adoption, is unable to make any definite statement. Such a case would, upon its face, require evidence of good faith of a very cogent character."

Mr. Blaine, Sec. of State, to Mr. Phelps, min. to Germany, No. 50, Jan. 10, 1890, For. Rel. 1890, 300.

For instructions to investigate, in the case of Bela Washington Fornet, the question of intent to return, see Mr. Blaine, Sec. of State, to Mr. Grant, min. to Austria-Hungary, March 25, 1890, For. Rel. 1890, 11.

H. L. B. applied to the American legation at The Hague in 1891 for a passport for himself and his son, a youth less than nineteen years of age. It appeared that H. L. B. was born in the Netherlands in 1848, and that his father was naturalized as a citizen of the United States in 1868. It also appeared that H. L. B. lived in the United

States till he reached his majority, and that a year later he went to Belgium, where, after residing there eighteen months, he married. He then returned alone to the United States, remaining about a year, when he went to Rotterdam, "where he established himself in business and has continued to reside ever since." He had no property interests in the United States, and with the exception of two brief visits had not been there since he took up his residence in Rotterdam. No member of his family had ever been outside of Europe. While stating that it was and ever had been his intention to return to the United States, he admitted that he could not fix any definite time for so doing, but indicated that his action would be governed by his business interests. It appeared that he had had two passports, one in 1870 from the American minister at Brussels, and the other in 1888 from the American minister at The Hague. It was held that he was not entitled on these facts to a passport.

Mr. Blaine, Sec. of State, to Mr. Thayer, min. to the Netherlands, No. 134, Feb. 6, 1892, MS. Inst. Netherlands, XVI. 109; Mr. Wharton, Act. Sec. of State, to Mr. Thayer, No. 143, March 21, 1892, id. 118.

Julius C. Eversmann applied to the American legation in Berlin in 1891 for a passport. He was born in Kentucky in 1842, of a German father who lived in the United States from 1839 to 1846, and who was said to have been naturalized, but of whose naturalization no evidence was presented. In 1846 Julius, being then four years old, was taken to Germany, where he lived for eighteen years. In 1864 he went to Mexico, where he resided fifteen years. In 1879 he returned to Germany, where he had since lived. From 1886 to 1889 he held the office of vice-consul of the United States at Düsseldorf. It was stated, with regard to his passport application, that, while he was willing to take the oath of allegiance, he frankly declared that he could not comply with the requirement as to stating an intention to return to the United States, since as he had no purpose whatever of doing so. It was held that, under the uniform ruling of the Department of State, this affirmation itself precluded the issuance to him of a passport.

Mr. Blaine, Sec. of State, to Mr. Coleman, chargé at Berlin, No. 366, Feb. 17, 1892, For. Rel. 1892, 179.

See, also, Mr. Uhl, Act. Sec. of State, to Mr. Eversmann, Dec. 1, 1893, 194 MS. Dom. Let. 429.

Sigmund Ehrenbacher, the native American son of a naturalized citizen of the United States, went abroad in 1879, at the age of twenty, and settled in London, where he permanently engaged in business as a hop merchant. In 1892 he applied to the American legation in

London for a passport. When, in filling up his application, he came to the point of declaring his intention as to returning to the United States, he remarked that he intended to go back when he had made money enough, which he hoped would be within ten years; but, when it was suggested that that time was remote, he said that he might perhaps do it in five years, and asked that that time be inserted. In a previous passport application, made in 1889, he stated that he intended to return to the United States within "a few months." It appeared that the hop business was established in London by the father, who left the United States ten years before the son and afterwards took the latter into the business. On all the circumstances, Mr. Lincoln, then American minister at London, expressed the opinion that Sigmund Ehrenbacher had no definite intention of returning to the United States, and that he was as "firmly settled in business" in London "as any one;" and the Department of State held that he was not entitled to a passport. Subsequently, however, he made an affidavit that he intended to open an office in New York during the next year, and stated that this would make it necessary for him to reside there frequently and for considerable periods, although, as he did not contemplate closing his London office, he would probably be obliged often to return to London. In view of this affidavit and of the fact that he was born in the United States and that his business was the sale of American hops, the legation decided to issue him a passport, declaring, however, at the same time, that its renewal two years later would depend upon his having then "established his permanent home in the United States."

Mr. Lincoln, min. to England, to Mr. Blaine, Sec. of State, April 29, 1892;  
Mr. Blaine to Mr. Lincoln, May 12, 1892; Mr. White, chargé, to Mr.  
Foster, Oct. 19, 1892: For. Rel. 1892, 226, 227, 235.

"These requirements [as to the declaration of an intention to return to the United States], while generally applicable to the cases of native-born citizens indefinitely sojourning abroad under circumstances creating a presumption of abandonment of their American domicil and status, are particularly necessary in respect to naturalized citizens quitting this country after acquiring citizenship, and especially to such as take up residence in the land of their original allegiance."

Mr. Foster, Sec. of State, to Mr. Denby, min. to China, No. 737, July 18, 1892, For. Rel. 1892, 124.

Fielder J. Hiss was born in the United States in 1851, of American parentage. In 1893 he applied to the American legation in London for a passport. He stated that his domicil was in London, where

had resided with his family since April 1892; that he was engaged in business there as treasurer and general manager of an English company; and that he had no intention to return to the United States to reside or perform the duties of citizenship. It was held that he was not entitled to a passport.

Mr. Gresham, Sec. of State, to Mr. Bayard, ambass. to England, No. 154  
Oct. 9, 1893, For. Rel. 1893, 329.

In the case of a minor, fourteen years old, a citizen of the United States, who had gone abroad as a servant to a Russian, with an intention of remaining five years, it was said: "In the case of a minor satisfactory proof of intent to return to the United States before or on obtaining majority may be accepted, even though the intended sojourn abroad may exceed two years."

Mr. Uhl, Act. Sec. of State, to Mr. White, amb. to Russia, No. 160, Feb.  
7, 1894, For. Rel. 1894, 561, 562.

H., a native of the United States, who was born in Texas in February 1861, left the United States with his father in 1866 and thereafter continued to reside in Mexico. He stated that his residence there was temporary, but made no declaration of intention to return to the United States. Held, that as he had permitted eleven years to elapse since he came of age without taking steps to resume his original domicil, and as he gave no satisfactory proof of his intention and ability to do so at any future time, a passport should not be issued.

Mr. Gresham, Sec. of State, to Mr. Gray, min. to Mexico, Feb. 10, 1894,  
For. Rel. 1894, 411.

On the ground that F. had resided continuously in Germany since he was five years of age, a period of twenty-six years; that he did not elect American nationality when he became of age; and that the intention expressed in a passport application in 1891, that he intended to return to the United States within two years, was not fulfilled, it was held that he was not entitled to a passport.

Mr. Gresham, Sec. of State, to Mr. Harris, June 2, 1894, 197 MS. Dom.  
Let. 223.

See Mr. Adee, Acting Secretary of State, to Mr. Thompson, minister to Brazil, August 8, 1895, briefly discussing various cases, in some of which passports had been issued and in others of which passports had been declined, the question involved being that of an intention to return to the United States.

For. Rel. 1895, I. 71-72.



Solomon Faden, born in Hungary in 1870, went to the United States at the age of sixteen, remained there five and a half years, and was naturalized September 17, 1891. He obtained a passport from the Department of State, September 30, 1891, upon an application declaring an intention to return to the United States in two years, there to reside and to perform the duties of citizenship, and went back to his native country. Two years later, in October 1893, he obtained a new passport from the United States legation at Vienna upon an application containing a similar declaration. Two years later, his passport having again expired, he applied for a renewal of it. It appeared that he had never voted in the United States, nor paid taxes there, nor had any connection with it in business. Since he obtained the second passport in 1893, he had married a native girl with some money, had purchased a business in his native town, and had apparently settled there to rear a family. With regard to returning to the United States, he said that "if his business does not go, he may try his luck in America." The legation declined to issue another passport. Its action was approved, the Department of State saying that as the application on which a new passport was obtained in 1893 "contained a positive declaration to return to the United States within two years to perform the duties of citizenship, it would require now very conclusive proof of his determination to so return in order to issue him a third passport. The facts you state, however, conspicuously negative any such purpose of return." In conclusion, the Department of State said:

"For some years the Department has in special cases, upon the repeated application for renewal of passports, directed that the applicant be warned that the declaration of intention to return to the United States is not an empty phrase, and that in the case of a further renewal being sought withholding of a passport would probably follow. You do not state whether any such warning was given to Mr. Faden, but his case does not seem sufficiently meritorious to invite the Department to stretch its custom in this regard. Both on the presumption and the facts he may be deemed to have voluntarily repatriated himself, and if he has not actually resumed Austrian allegiance in conformity with the laws of that country, he has at least voluntarily abandoned practical allegiance to the Government of his acquired nationality to such an extent as to absolve it in return from the duty of protecting him while he maintains indefinite and apparently permanent domicile in the land of his birth."

Mr. Olney, Sec. of State, to Mr. Townsend, chargé at Vienna, Oct. 31, 1895, replying to a despatch of Mr. Townsend of Oct. 14, 1895, For. Rel. 1895, I. 22-24.

Two persons, natives of the United States, applied to the legation at Buenos Ayres for passports. It appeared that they still owned property in California, which they occasionally visited, but that their property interests in the Argentine Republic were so much greater that they admitted that they could not reside permanently in the United States nor could make any statement of a definite character regarding their intention to return to that country. They were not engaged in trade with the United States. It was held that they were not entitled to passports.

Mr. Olney, Sec. of State, to Mr. Buchanan, min. to the Argentine Repub., No. 101, Nov. 8, 1895, MS. Inst. Argentine Repub. XVII. 143.

The declaration of intention to return "does not require a statement of a fixed date of return, but the manifestation of a fixed intention to return within some reasonable time, which intention shall not be conspicuously negatived by the circumstances of the foreign domicile of the declarant."

Mr. Olney, Sec. of State, to Mr. Thompson, min. to Brazil, Nov. 12, 1895, For. Rel. 1895, I. 74.

"The action of the Department in regard to the issuance of passports, and the limitation which its rules impose on such issuance in a foreign country or by the Department, do not rest on any precise inhibition by legislation, but are in the exercise of the discretion which the statute confers upon the Secretary of State, who 'may' issue such passports to citizens of the United States.

"In naturalization treaties between governments, a provision is commonly found to the effect that the return of a naturalized person to his native country and residence therein for two years may be taken as creating a presumption of intention not to return to the country of adoption. It is also a very general principle of international law, applied in practice by many states, that withdrawal from the country of allegiance, for a number of years or indefinitely, operates as a renunciation of citizenship or of the right to protection as a citizen while so failing to perform the duties of citizenship.

"For these reasons it has been found necessary to require of all applicants for passports a formal declaration of intention to return to the United States here to reside and perform the duties of citizenship, and the validity of a passport issued is limited to two years. If, upon applying for its renewal, the party, being still abroad, is unable to satisfy the issuing authority of his or her purpose to return to the United States, the question of issuing a passport for indefinite residence abroad necessarily arises, to be determined according to the facts of each case. . . . In issuing passports to parties in the

United States for purposes of foreign travel, the Department does not exact a declaration of intention to return within a definite term, but a declaration of definite intention to return within some reasonable time."

Mr. Olney, Sec. of State, to Mr. Anderson, Nov. 21, 1896, 214 MS. Dom. Let. 95. "The authority for requiring from an applicant for a passport a declaration of intent to return to the United States is found in section 4075, Revised Statutes, which gives the President authority, acting through the Secretary of State, to designate and prescribe the rules governing the issuance of passports." (Mr. Rockhill, Assist. Sec. of State, to Mr. Ward, Jan. 27, 1897, 215 MS. Dom. Let. 430.)

A. A. W. applied to the American legation in St. Petersburg in 1897 for a new passport for himself, his wife, and four minor children. He was a native of the United States, but had been continuously absent from the country since 1867. He had previously obtained a passport from the legation in 1895, and on that occasion declared his intention to return to the United States. When asked in 1897 why this intention had not been carried into effect, he stated that he had been prevented from so doing by illness, and that he was "now saving money for the trip." Under the circumstances, the good faith of this declaration was questioned, and it was held that he was not entitled to a passport.

Mr. Sherman, Sec. of State, to Mr. Breckinridge, mln. to Russia, No. 403, April 20, 1897, MS. Inst. Russia, XVII. 567.

Where a naturalized citizen of the United States had withdrawn himself for 26 years from the country of his adoption and resided for most of that time in the country of the origin of his wife, and had obtained previous passports on declarations of intention to return to the United States, which had not been fulfilled, it was held that "very positive proof" of an actual intention to return to the United States would be required to overcome the presumption that he had "long abandoned the right to protection while residing abroad."

Mr. Sherman, Sec. of State, to Mr. Storer, mln. to Belgium, Nov. 10, 1897, For. Rel. 1897, 31, 32.

Henry Louis Becker, a native of Holland, emigrated with his father in 1853 to the United States, where, during his minority, his father was naturalized. In May, 1893, being then thirty-five years of age, the son obtained a passport and went to Belgium. In March, 1896, he obtained a new passport from the United States legation at Brussels. In January, 1899, he applied for yet another passport, his previous one having expired in March, 1898. In obtaining the passport in 1896 he signed the usual application containing a declaration of intention to return to the United States within two years. A

question having been raised by Mr. Storer, American minister at Brussels, as to whether a new passport should be issued, the Department of State said: "It does not appear . . . that Mr. Becker was warned by your predecessor at the time of the issuance of the legation passport, March 19, 1896, that failure to return within the declared term of two years might bar renewal of the passport. Under the circumstances, if Mr. Becker shall satisfactorily explain the causes preventing the execution of the purpose declared by him in 1896, and shall satisfy you of the bona fides of his intention now to return within two years hence, here to dwell and perform the duties of good citizenship, you would be warranted in issuing him a passport accompanied by a distinct warning that failure to carry out that intention would prejudice, and probably bar, the granting of any future passport to him while he continues to dwell abroad."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, Feb. 4, 1899, For. Rel. 1899, 84, 85.

In reply, Mr. Storer made a renewed presentation of the case, calling attention to a letter of the Department of State which was widely noticed in the journals in Europe in November, 1898, and which seemed to lay down the rule that where the individual had failed to give effect to the declaration made in his application of an intention to return to the United States within two years, a satisfactory explanation must be given of his failure to do so, as well as satisfactory evidence of a bona fide intention not again to be chargeable with a similar omission. Mr. Storer further said: "The precise point in the present case . . . was whether, having in view this statute, § 2172 [R. S.], anyone made American citizen solely by the naturalization of his father, continuously living in Europe since his return thither with his family, who has founded a manufacturing association under the laws of a foreign country, in the name of which he carries on business, could for himself and his family continue to renew the protection of a United States passport? . . . The remark of your instruction, that it nowhere appears the applicant was warned by my predecessor in March, 1896, that a failure to carry out his sworn intention might bar a renewal of his passport, is absolutely correct, but I submit that two years hence, when he again applies for protection from the operation of the laws of Belgium, it will nowhere appear that this warning was given him by me in 1899, and precisely the same responsibility and doubt will then be thrown on this legation then that is now sought to be settled once for all by Departmental instruction." Meanwhile a new passport was not issued.

Mr. Storer, min. to Belgium, to Mr. Hay, Sec. of State, Feb. 21, 1899, For. Rel. 1899, 86.

In a further instruction the Department of State said: "The conflicting statements as to Mr. Becker's domicile in the United States which you report, the lack of evidence of his purpose to return here to dwell, and the apparent inconsistency of the conditions of his indefinite residence abroad, and of his founding a manufacturing establishment under foreign laws with the holding of a bona fide and realizable purpose on his part so to return and discharge the duties of citizenship, seem to warrant your withholding the renewal to him of a passport." It was further stated that the letter to which the legation referred was one addressed to Mr. F. Clarke, in Paris, under date of November 4, 1898, in which it was stated that "the best evidence of the intention of an applicant for a passport to discharge the duties of a good citizen is to make the United States his home; the next best is to shape his plans so as to indicate a tolerable certainty of his returning to the United States within a reasonable time. If the declared intention to return be conspicuously negatived by the circumstances of sojourn abroad a passport may be withheld."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, March 6, 1899, and Mr. Hill, Assist. Sec. of State, to Mr. Clarke, Nov. 4, 1898, For. Rel. 1899, 87, 88.

"It has been the consistent ruling of the Department that the declaration by an applicant for a passport of intention to return to the United States does not require a statement of a fixed date of return, but the manifestation of a fixed intention to return within some reasonable time, which intention shall not be conspicuously negatived by the circumstances of the foreign domicile of the claimant. The domicile of a person depends upon his intention, which is to be determined upon all the facts of the case. The Department is always well disposed toward those Americans, whether by birth or naturalization, who sojourn abroad in representation of American commercial interests."

Mr. Hay, Sec. of State, to Mr. White, chargé at London, Feb. 23, 1899, For. Rel. 1899, 340.

This was a reply to a dispatch from Mr. White, enclosing a letter from Mr. Van Duzer, secretary of the American Society in London, suggesting that Americans sojourning abroad be not compelled to declare in applications for passports an intention to return to the United States to take up the duties of citizenship within two years. Mr. White added that the declaration to that effect, embodied in the form which applicants for a passport are compelled to sign, undoubtedly operated occasionally to prevent the issuance of passports to bona fide native-born Americans who paid taxes often to a large amount at home, but who, on account of business, health, or other cause, were unable to remain in the United States. (For. Rel. 1899, 339.)

Edward Klipfel, a naturalized citizen of the United States, declared in his application for a passport that he had "no idea of

returning to the United States." It appeared that he left the United States in June, 1898, after residing there 16 years, and that he had three minor children who were born in the United States. It was held that Mr. Klipfel could not "expect to receive the protection that a passport affords when he manifests no intention of performing the duties of a citizen of the United States;" but that this did "not deprive his children, who were born in this country, and have been taken away by him, of their right to our protection until they reach their majority and may elect an allegiance of their own;" and that the legation should, if called upon to do so, "recognize them as citizens of the United States."

Mr. Hay, Sec. of State, to Mr. Leishman, min. to Switzerland, July 3, 1899, For Rel. 1899, 761.

"A condition precedent to the granting of a passport is, under the law and the rules prescribed by authority of the law, that the citizenship of the applicant and his domicile in the United States and intention to return to it with the purpose of residing and performing the duties of citizenship shall be satisfactorily established. One who has expatriated himself can not, therefore, receive a passport. [Here follows Mr. Fish's definition of expatriation, *supra*, p. 712.] But even where expatriation may not be established, a person who is permanently resident and domiciled outside of the United States can not receive a passport. 'When a person *who has attained his majority* removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there *animo manendi*, and it lies upon him to explain it' (Mr. Fish to the President, For. Rels. 1873, 1186, et seq.). If, in making application for a passport, he swears that he intends to return to the United States within a given period, and afterwards, in applying for a renewal of his passport, it appears that he did not fulfill his intention, this circumstance awakens a doubt as to his real purposes, which he must dispel (For. Rels. 1890, 11).

"The treatment of the individual cases as they arise must depend largely upon attendant circumstances. When an applicant has completely severed his relations with the United States; has neither kindred nor property here; has married and established a home in a foreign land; has engaged in business or professional pursuits wholly in foreign countries; has so shaped his plans as to make it impossible or improbable that they will ever include a domicile in this country—these and similar circumstances should exercise an adverse

influence in determining the question whether or not a passport should issue. On the other hand, a favorable conclusion may be influenced by the fact that family and property connections with the United States have been kept up; that reasons of health render travel and return impossible or inexpedient; and that pecuniary exigencies interfere with the desire to return. But the circumstance which is perhaps the most favorable of all is that the applicant is residing abroad in representation and extension of legitimate American enterprises."

Mr. Hay, Sec. of State, to U. S. Dip. & Cons. Officers, Circular, March 27, 1899, For. Rel. 1902, 1.

"Information having reached the Department that some of the diplomatic and consular officers of the United States have refused to issue passports to applicants who were unable or unwilling to state that they intended to return to the United States within two years from the date of their applications, you are instructed that the Department does not hold that a passport can not be granted to a person who does not make such a statement. As explained in the Department's circular instruction of March 27, 1899, a passport should not be issued to any person who does not intend to return to the United States, or whose expressed intention to return is negatived by circumstances attending his residence abroad; but it is not intended to fix a definite period of time beyond which the protection of a passport is to be refused to a citizen of the United States. A passport is good only for two years from the date of issuance, but a new one may be granted when a new and satisfactory application is made."

Mr. Hill, Act. Sec. of State, to U. S. Dip. & Cons. Officers, Circular, Sept. 26, 1899, For. Rel. 1902, 4.

In an instruction to diplomatic and consular officers, Jan. 17, 1902, it is stated that the Department of State "has from time to time received complaints from persons sojourning abroad that they have been refused passports because they were unable to state definitely when they intended to return to the United States." Renewed attention is therefore directed to the circulars of March 27 and Sept. 26, 1899, "so that no one who has effectually expatriated himself from the United States shall receive the protection which he has forfeited a right to expect, and, on the other hand, no one shall be denied protection who is a loyal American citizen not permanently and voluntarily absent from this country."

Mr. Hay, Sec. of State, Circular, Jan. 17, 1902, For. Rel. 1902, 1.

The circular of March 27, 1899, is printed in For. Rel. 1902, 1; and that of Sept. 26, 1899, id. 4.

## 7. CONNECTION WITH AMERICAN BUSINESS INTERESTS.

## § 520.

Solomon M. Pollock emigrated to the United States in 1875, was naturalized in 1882, and left two days afterwards for Switzerland, where he had since resided as agent for the firm of Leon, Levy & Brothers, of New York and San Francisco. In 1887, when applying to the American legation at Berne for a passport, he said that he was unable to state when he would return to the United States; that his stay depended on the time when his firm might recall him, and that they might do so within the next six months, or might not do so for years. The legation was instructed:

"If you are fully satisfied that Mr. Pollock is actually detained abroad by his employment as the agent of an American firm transacting business in the United States, and if he declares it to be his intention upon the termination of such employment and agency to return to the United States there to reside and take upon himself the duties of such citizenship, then you can issue to him a passport in accordance with the principles laid down in this Department's instructions to you, No. 102, of the 13th instant."

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switz., No. 104, Oct. 24, 1887, For. Rel. 1888, II. 1500.

The fact that an applicant for a passport is "engaged in business in the country of his residence . . . may have importance, in opposite directions indeed, in connection with all the other facts. An American, whether by birth or naturalization, residing abroad, in representation of an American business, and keeping up an interested association with this country, is in a different case from an alien who returns, immediately after naturalization, to his native place, there to engage in a local calling and, it may be, marrying there and exhibiting every evidence of an intention to make his home among his kindred. In the latter instance it would require strong proof to countervail the prima facie presumption that his naturalization was obtained solely to enable him to dwell thereafter in his native land without subjection to the duties and burdens of native citizenship."

Mr. Blaine, Sec. of State, to Mr. Grant, min. to Austria-Hungary, March 25, 1890, For. Rel. 1890, 11, 12.

"I have received your No. 48, of the 19th ultimo, stating that, in view of the uncertain condition of affairs in the Argentine Republic, numerous applications for passports will be, in all probability, made to the legation by citizens of the United States long domiciled in that country and who are engaged in trade or other occupations. You further state that these persons have never assumed Argentine



allegiance, regard themselves as American citizens, and declare it to be their intention to return at some time to the United States. You add that the blank forms of application for passports seem to exclude such cases.

"The Department is of opinion that legitimate association in business enterprises connected with commerce between the United States and the country of residence of the person claiming American citizenship, while entailing protracted and indefinite sojourn abroad, is not incompatible with an intent to return; but such intent must satisfactorily appear. The blank forms contemplate the statement of facts evidencing, of themselves, a retention of United States domicil, but where those facts do not exist, the intention to return some time must be satisfactorily established otherwise, and not be obviously negatived by the circumstances of residence abroad."

Mr. Blaine, Sec. of State, to Mr. Pitkin, min. to Arg. Rep., No. 52, May 26, 1890, For. Rel. 1890, 3.

See, also, Mr. Blaine, Sec. of State, to Mr. Lincoln, min. to England, No. 219, March 24, 1890, For. Rel. 1890, 328.

"By active representation of American business interests abroad, and identification with affairs in this country, proof of retention of an American status may exist independently of intention to return hither at a fixed time."

Mr. Blaine, Sec. of State, to Mr. Smith, min. to Russia, No. 63, Dec. 3, 1890, MS. Inst. Russia, XVI. 675.

See, also, Mr. Blaine, Sec. of State, to Mr. Ryan, April 9, 1892, MS. Inst. Mexico, XXIII. 203.

With regard to Mr. Blaine's instructions to Mr. Pitkin, minister to the Argentine Republic, of May 26, 1890, *supra*, it is to be observed that there is an evident difference between residence abroad in representation of a distinctively American industry or business having its origin and headquarters in the United States, and the building up of an industry in Europe which merely seeks an incidental market in the United States.

Mr. Blaine, Sec. of State, to Mr. Thayer, min. to the Netherlands, No. 134, Feb. 6, 1892, MS. Inst. Netherlands, XVI. 109; Mr. Wharton, Act. Sec. of State, to Mr. Thayer, No. 143, March 21, 1892, *id.* 118.

Being engaged in foreign lands in trade with the United States is a reason for making an exception to the rule requiring an applicant for a passport to show his intention to return to and reside in the United States.

Mr. Gresham, Sec. of State, to Mr. Runyon, November 1, 1894, 19 MS. Inst. to Germany, 154.

"Referring to 176 Appendix to Wharton's Digest of International Law, it appears to be the policy of the Department to recognize the claims to protection of agents of American commercial establishments in foreign countries who, by peculiar qualifications, are useful in promoting our mercantile relations, in spite of long-continued absence from the United States.

"It is extremely desirable for the extension of our commercial relations with Russia that the services of American citizens, speaking the Russian language and familiar with the country, should be available to promote the interests of our producers at home, as agents, or in such other capacity as circumstances may require. To require that the connection of such agents or employees should be limited to two years, or any other brief term, would seriously impair their usefulness.

"Upon this principle it was the practice of my predecessor to grant passports to agents for American commercial and industrial enterprises in Russia.

"While recognizing the desirability of continuing this practice, and desiring a distinct ruling of the Department authorizing its continuance, I desire also to call your attention to certain cases, some of which, while technically coming within this category, are in fact little more than evasions of the Department's rulings, while, if the volume of business done is to be a standard, others would at present lie outside of the category, although in the near future they might come well within it. . . .

"With the earnest desire that our promising and growing commercial interests with Russia may have the fullest measure possible of that assistance which bona fide endeavors of American citizens here can render, and this without applying to infant commercial enterprises a test of present volume of business, where that might be unjust, I still desire to eliminate abuse of the continued protection accorded to American citizens by persons who use the color of such occupation to evade the rulings of the Department regarding abandonment of citizenship."

Mr. Hitchcock, amb. to Russia, to Mr. Day, Sec. of State, May 10, 1898, For. Rel. 1898, 533.

"You evidently have a correct understanding of the policy of the Department with regard to the issuance of passports to persons indefinitely residing abroad, and the Department feels that it may be safely left to you to deal with each individual case in your discretion." (Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898, For. Rel. 1898, 535, 536.)

H., a citizen of the United States, had resided in St. Petersburg since 1875. He was in the employ of the firm of W. Ropes & Co., an American commercial house, and acted as the manager of its business

in Russia. The embassy of the United States at St. Petersburg in 1898 granted him a new passport "upon the strength of his connection with Ropes & Co., and his statement of their real purpose to reanimate their commercial undertakings between the United States and Russia," their business with Russia, which was once large, having been allowed to become "little more than a name."

Mr. Hitchcock, amb. to Russia, to Mr. Day, Sec. of State, May 10, 1898,  
For. Rel. 1898, 533, 534, approved by Mr. Day, Sec. of State, to Mr.  
Hitchcock, amb. to Russia, June 3, 1898, *id.* 535, 536.

Certain citizens of the United States, apparently permanent residents of Russia, claimed a renewal of their passports on the ground that they acted as the agents in Russia of certain German representatives of American manufacturers.

The disposition of the applications was left to the discretion of the United States embassy at St. Petersburg, with the statement that the Department of State was "scarcely prepared to recognize" the right of the persons in question.

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898,  
For. Rel. 1898, 535.

"It has been and should continue to be the policy of the Government to foster and promote the manufacturing and commercial interests of the United States, and to that end, in the case of bona fide agents and representatives of American interests, the rules usually applied to our citizens in respect to residences are relaxed. Of course, mere technical compliance with the requirements in these exceptional cases is not sufficient. If you feel satisfied that the party applying for protection is not actually and in good faith representing American interests, then it is your duty to refuse to grant a passport. The extent of business done, while sometimes an important factor, should not be considered the sole criterion in judging of the good faith of the party."

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898,  
For. Rel. 1898, 535, 536.

R., a naturalized citizen of the United States, resided at Moscow fifteen years, practicing as a dentist. During that time he obtained various passports, in each case upon an application in which he declared his intent to return to the United States, there to perform the duties of citizenship. The United States embassy at St. Petersburg having at length refused to renew his passport, he requested protection for at least six months. The embassy agreed to grant it, only on condition that he declare on oath his intention to return to the United States within that time. He claimed to be an agent for the sale of

American dental instruments in Russia, but it did not appear that he had made any sales. The decision of the embassy was approved.

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 23, 1898, For. Rel. 1898, 540.

M., a citizen of the United States, resided for years in Moscow, engaged in the practice of dentistry. In time he ostensibly became the agent of an American gun company and an American clock company. On the ground that these agencies were a cloak under which to evade the rule as to the effect of permanent foreign residence, it was decided not to renew his passport unless he should give "conclusive evidence of a real intent, supported by acts, to return to the United States, there to reside and perform the duties of citizenship."

Mr. Day, Sec. of State, to Mr. Hitchcock, ambassador to Russia, June 23, 1898, For. Rel. 1898, 540.

See, in relation to this case, Mr. Adee, Second Assist. Sec. of State, to Mrs. Slegel, Nov. 8 and Nov. 11, 1897, 222 MS. Dom. Let. 284, 362; Mr. Sherman, Sec. of State, to Mr. Hitchcock, amb. to Russia, No. 8, Dec. 22, 1897, 17 MS. Inst. Russ. 652; Mr. Hay, Sec. of State, to Mr. Tower, amb. to Russia, No. 125, Feb. 12, 1900, 18 MS. Inst. Russia, 252.

The Department of State, in its application of the rule requiring of an applicant for a passport, not indeed "a statement of a fixed date of return, but the manifestation of a fixed intention to return, within some reasonable time, which intention shall not be conspicuously negatived by the circumstances of the foreign domicil of the claimant," is "always well disposed towards those Americans, whether by birth or naturalization, who sojourn abroad in representation of American commercial interests."

Mr. Hay, Sec. of State, to Mr. White, chargé at London, No. 1095, Feb. 23, 1899, MS. Inst. Gr. Br. XXXIII. 97.

#### 8. MISSIONARIES.

##### § 521.

The Rev. Hugo Praessar was born in Germany in 1833, emigrated to the United States in 1868, and was naturalized in September, 1876. Three days later he obtained a passport and went to Europe. He subsequently paid several visits to the United States, on one occasion remaining more than two years. He last left the United States in 1883. His occupation was that of a missionary priest. In 1889 he applied to the American legation in Vienna for a passport, stating that it was his purpose to take charge of a convent in Roumania for the larger part of the next two years, and then to return to the United States. The Department of State said: "It is thought that the absence of Mr. Praessar from the United States is satisfactorily explained on grounds consistent with the retention by him of the

character of an American citizen. The nature of his labors renders the place of his residence uncertain and changeable, and tends to negative the inference which ordinarily might be drawn from a prolonged absence from the United States. The Department is, therefore, of opinion that it is proper to issue him a passport."

Mr. Blaine, Sec. of State, to Mr. Grant, min. to Austria-Hungary, No. 42, Jan. 22, 1890, MS. Inst. Austria-Hungary, III. 525.

"In respect to American-born citizens, residing abroad as missionaries in the employ of an American society, the Department is disposed to relax some of the requirements as to domicile and fixity of intention to return to the United States as defined in the application blanks."

Mr. Foster, Sec. of State, to Mr. Newberry, No. 357, July 21, 1892, MS. Inst. Turkey, V. 369.

The instructions of the Department of State in relation to the passport applications of American missionaries in China, as well as in other countries where the United States exercises extraterritorial jurisdiction, "have taken the ground that the vocation of the missionaries employed by societies established in the United States may not admit of any very positive declarations of intention to return to the United States," but that "some declaration of a more or less floating or indefinite character," "displaying the intent to return, is necessary." The Department "can not authorize the issuance of a passport upon any declaration tantamount to the expression of an intention not to return." But it was held that a declaration might be made in the following form: "I was, before coming to China, domiciled at ———, in the United States, and I have not assumed any other legal domicile, but I have come to China to engage in missionary work under the auspices of ———, a society organized and residing at ———, in the United States."

With regard to this declaration, for use in China, the following explanation was made:

"This declaration may be accepted equally well from a naturalized citizen as from a native. As a Chinaman can not be naturalized in the United States, the deduction naturally following return to and continued domicile in the country of origin can not exist within your jurisdiction."

Mr. Adee, Act. Sec. of State, to Mr. Denby, min. to China, No. 1470, July 20, 1897, MS. Inst. China, V. 460.

See Mr. Foster, Sec. of State, to Mr. Denby, min. to China, No. 737, July 18, 1892, For. Rel. 1892, 124.

"I have to acknowledge the receipt of your dispatch, No. 283, of the 28th of November, inclosing passport application of Logan Her-

bert Roots and Oliver Tracey Logan, medical missionaries, which you have declined to grant on the ground that they do not state intention to return to the United States, but, on the contrary, expressly state their expectation to remain permanently in China, and also inclosing correspondence with the United States consul at Hankow on the subject, showing a difference of views between your legation and the consulate as to the propriety of issuing the passports in question under the Department rules.

"A late instruction, which is applicable to the case under discussion, may be found in that paragraph of the Department's circular instruction of March 27, 1899, reading:

" 'The status of American citizens resident in a semibarbarous country or in a country in which the United States exercises extraterritorial jurisdiction is singular. . . . Their residence may be indefinitely prolonged, since obviously they can not become subjects of the native Government without grave peril to their safety. The Department's position with respect to these citizens has uniformly been to afford them the protection of a passport as long as their pursuits are legitimate and not prejudicial to the friendly relations of this Government with the Government within whose limits they are residing.'

"The pursuits of a missionary, properly conducted, are legitimate, and American missionaries of good standing have always enjoyed continuous protection from this Government in China. In 1894 Mr. Gresham said:

" 'Our legations have been authorized to issue passports to missionaries in foreign lands whose residence there was continuous and practically permanent, and who could not allege any definite intention of returning to, and residing in, the United States.' (The American Passport, p. 209.)

"These are merely instances of instructions of the same character which have been often repeated, and which may be found upon consulting the volumes of Foreign Relations. Their substance is adequately compressed in the instruction of Mr. Cridler, the Third Assistant Secretary of State, to the consul at Hankow, dated September 4, 1899, and quoted by the consul in the correspondence you submit. Mr. Cridler said:

" 'Recognizing that such of our citizens who have gone to China to pursue their religious calling may not return, but continue their work indefinitely abroad, the Department is disposed to sanction their receiving passports on taking the oath of allegiance.'

"It is true that in the Department's circular instruction of September 26, 1899, on the subject of passports and intent to return to the United States, the words quoted in the legation's letter of November 27, 1899, to the consul at Hankow occur: 'A passport should not issue

to any person who does not intend to return to the United States.' This language, however, should be taken in connection with the rest of the same sentence: '*As explained in the Department's circular instruction of March 27, 1899, a passport should not issue to any person who does not intend to return to the United States,*' etc. That circular (March 27, 1899) fully explained the exceptional position of American citizens resident in a country like China.

"It is not intended by this instruction that the legation should issue a passport to anyone who declares that he neither intends nor desires to return to this country, or even to anyone who defiantly announces that he has no intention of returning, for such a statement would be tantamount to the expression of a desire to expatriate himself and absolve himself from allegiance to the United States; but as long as the loyal attachment to this Government continues and the legitimate and proper occupation of the applicant in China precludes his entertaining a definite purpose of return, the protection of a passport should continue. Taking the applications of Messrs. Roots and Logan as they appear in the legation's dispatch, the Department is of opinion that they should receive renewed passports."

Mr. Hay, Sec. of State, to Mr. Conger, min. to China, Jan. 18, 1900, For. Rel. 1900, 393.

#### 9. EFFECT OF EXTRATERRITORIALITY.

##### § 522.

Henry Asché, who was born in Bassorah, Turkey, in 1866, and who had resided there, and in Germany and France, but had never been in the United States, applied to the United States legation in Paris, in 1888, for a passport. He claimed American citizenship through his father, a native of Germany, who was naturalized in the United States in 1854, but who a few years later settled in Bassorah, where he thereafter continued to live, and where he died in 1870. The son manifested no intention of ever coming to the United States. "It is to be doubted," said the Department of State, "whether the father, under these circumstances of such continuous abandonment of his American residence and all the duties and responsibilities of American citizenship, could have been entitled to a passport without having a well-established intention on his part of returning to the country whose protection he so sought, and for which he proposed to render no equivalent. But the son of such a person born abroad, always living abroad, in Turkey, in Germany, and in France, never having been in the United States, and having no intention ever to come here, being of full age, is not entitled to receive the certification of the citizenship of a country towards whom he sustains none of the relations of a citizen. . . . Whatever might have been the right

of the Aschés, father and son, if their continuous residence in Turkey as American citizens had been alleged and established, is not necessary to be here considered because no such case is shown, but on the contrary the voluntary residence of the son in Germany (the country of his father's origin) and in France, coupled by his election when upwards of twenty-two years of age there to reside, without any intention ever to come to the United States, proves abundantly his abandonment of American citizenship."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, May 7, 1888, For. Rel. 1888, I. 534, citing the case of Landau, Wharton's Int. Law Dig. II. 370.

Mr. Coombs, minister of the United States at Tokio, referring, in a dispatch of July 14, 1893, to the withholding of passports from citizens of the United States on account of their continuous and indefinite foreign residence, said: "I hope I may be able to call your attention to the practical operation of this rule in the East without seeming to question its correctness. There are many Americans in Japan engaged in a variety of occupations who must fall under the ban of this law; some employed by the Japanese Government, some in mercantile pursuits, some in the professions, and all in their different places exercising an influence on civilization and giving strength to the position of our country.

"Our institutions are upheld, our flag honored, and the national character exalted. If they are not afforded the ordinary protection of their country their influence would be destroyed and, I imagine, their places would be filled by other nationals. These men exert as much good for their country as they could if they were within its territory.

"They, nevertheless, are called upon to perform jury duties in consular courts and are otherwise amenable to the processes thereof. To suspend their rights means to destroy one of the great national influences of our people in the East."

To these observations the following answer was made: "In those oriental countries where the rule of extraterritoriality prevails, the test of citizenship found in a continued connection with business interests having their root in the United States may have its weight, but there are other tests, as Mr. Coombs suggests, having equal or perhaps greater value in showing a bona fide conservation of the American character and an effort to uphold the good repute of our country abroad. It should not be difficult in the light of common sense to distinguish between merely selfish residence abroad, under circumstances which involve a practical renunciation of all home ties and the adoption of a course which essentially requires the individual's nationality to be asserted. Men who . . . are by their employment and conduct 'exercising an influence on



civilization and giving strength to the position of our country' in Japan, need not fear inquiry into the good faith wherewith they retain a distinctive American nationality."

Mr. Gresham, Sec. of State, to Mr. Dun, min. to Japan, Aug. 22, 1893, For. Rel. 1893, 405. For Mr. Coombs' dispatch, see id. 404.

W., who was born in South Africa of American parents, had never been in the United States, and declared merely that he would go thither "within my lifetime," applied, at the age of 24, to the American legation at Tokio for a passport. He had obtained an American passport three years previously from the legation in China, where he then resided. The Department of State instructed the legation at Tokio that, unless W. should satisfy it "of his intention to come in the reasonably near future to reside in the United States and perform the duties pertaining to American citizenship, he would not appear to be entitled to a passport;" that section 1993, Revised Statutes, declaring the foreign-born "children" of American citizens to be citizens also, did not entitle one so born "to disregard all duties of citizenship indefinitely and to live abroad permanently without imputation of his nationality;" that as W. was residing, if not domiciled, in Japan, where the alien privilege of extraterritoriality had been abrogated, his status was governed by the same principles as if he were residing in a European state; that the point to be determined was whether "by domicile, occupation, and domestic ties" he had "so far permanently identified himself with the country of his residence as to create a presumption of abandonment of his American status strong enough to outweigh any merely floating intention he may have of eventually making the United States his home;" but that it was, "as a general thing, the Department's desire to deal as broadly as possible with questions affecting the rights of Americans sojourning in the far Orient, and to consider whether, if the protection of the United States should be withdrawn, the individual can obtain any other."

Mr. Hay, Sec. of State, to Mr. Buck, min. to Japan, March 21, 1900, For. Rel. 1900, 759.

"The status of American citizens resident in a semibarbarous country or in a country in which the United States exercises extraterritorial jurisdiction is singular. If they were subjects of such power before they acquired citizenship in the United States, they are amenable, upon returning, to the same restrictions of residence as are laid down in the beginning of this instruction, and for the same reasons; but if they are not in that category, their residence may be indefinitely prolonged, since obviously they can not become subjects of the native government without grave peril to their safety. The Department's position with respect to these citizens has uniformly been to afford them the protection of a passport as long as their pur-

suits are legitimate and not prejudicial to the friendly relations of this Government with the government within whose limits they are residing; and the Department has even held that persons who are members of a distinctly American community in Turkey and avail themselves of the extraterritorial rights given by Turkey to such communities may inherit their rights as American citizens, and that section 1993 of the Revised Statutes of the United States, which provides that 'the rights of citizenship shall not descend to children whose fathers never resided in the United States,' is not applicable, such descendants being regarded, through their inherited extraterritorial rights recognized by Turkey herself, as born and continuing in the jurisdiction of the United States (For. Rel. 1887, 1125)."

Mr. Hay, Sec. of State, to U. S. dip. & cons. officers, circular, March 27, 1899, For. Rel. 1902, 1, 3.

#### VI. DURATION OF PASSPORTS.

##### 1. TIME LIMIT.

##### § 523.

"A new passport will be expected to be taken out by every person whenever he or she may leave the United States, and every passport must be renewed, either at this Department or at a legation or consulate abroad, within one year from its date."

Mr. Seward, Sec. of State, to U. S. dip. & consular officers, circular, No. 24, Sept. 25, 1862, MS. Circulars, I. 211.

"It has been brought to the knowledge of this Department that many of the consuls of foreign governments residing in the United States are in the habit of attaching their visé to passports of citizens of the United States which have been issued more than a year. As the regulation of this Department, made pursuant to law, requires that a new passport shall be taken out by every citizen of the United States whenever he or she may leave the country, and that every passport to be valid must be renewed, either at this Department or at a legation or consulate of the United States, at the expiration of one year from its date, and that a revenue tax of five dollars shall be paid on each passport at the time at which it shall be issued or renewed, it is essential to the protection of the revenue due from this source that foreign consuls should abstain from attaching their visé to passports which have been used on a former absence of the holder from the United States or which are a year or more old when presented for visé. I will consequently thank you to notify the consuls serving your Government in this country of this requirement."

Mr. Fish, Sec. of State, to the Members of the Diplomatic Corps, Circular, May 9, 1870, MS. Circulars, I. 417.

in Russia. The embassy of the United States at St. Petersburg in 1898 granted him a new passport "upon the strength of his connection with Ropes & Co., and his statement of their real purpose to reanimate their commercial undertakings between the United States and Russia," their business with Russia, which was once large, having been allowed to become "little more than a name."

Mr. Hitchcock, amb. to Russia, to Mr. Day, Sec. of State, May 10, 1898, For. Rel. 1898, 533, 534, approved by Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898, *id.* 535, 536.

Certain citizens of the United States, apparently permanent residents of Russia, claimed a renewal of their passports on the ground that they acted as the agents in Russia of certain German representatives of American manufacturers.

The disposition of the applications was left to the discretion of the United States embassy at St. Petersburg, with the statement that the Department of State was "scarcely prepared to recognize" the right of the persons in question.

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898, For. Rel. 1898, 535.

"It has been and should continue to be the policy of the Government to foster and promote the manufacturing and commercial interests of the United States, and to that end, in the case of bona fide agents and representatives of American interests, the rules usually applied to our citizens in respect to residences are relaxed. Of course, mere technical compliance with the requirements in these exceptional cases is not sufficient. If you feel satisfied that the party applying for protection is not actually and in good faith representing American interests, then it is your duty to refuse to grant a passport. The extent of business done, while sometimes an important factor, should not be considered the sole criterion in judging of the good faith of the party."

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 3, 1898, For. Rel. 1898, 535, 536.

R., a naturalized citizen of the United States, resided at Moscow fifteen years, practicing as a dentist. During that time he obtained various passports, in each case upon an application in which he declared his intent to return to the United States, there to perform the duties of citizenship. The United States embassy at St. Petersburg having at length refused to renew his passport, he requested protection for at least six months. The embassy agreed to grant it, only on condition that he declare on oath his intention to return to the United States within that time. He claimed to be an agent for the sale of

American dental instruments in Russia, but it did not appear that he had made any sales. The decision of the embassy was approved.

Mr. Day, Sec. of State, to Mr. Hitchcock, amb. to Russia, June 23, 1898, For. Rel. 1898, 540.

M., a citizen of the United States, resided for years in Moscow, engaged in the practice of dentistry. In time he ostensibly became the agent of an American gun company and an American clock company. On the ground that these agencies were a cloak under which to evade the rule as to the effect of permanent foreign residence, it was decided not to renew his passport unless he should give "conclusive evidence of a real intent, supported by acts, to return to the United States, there to reside and perform the duties of citizenship."

Mr. Day, Sec. of State, to Mr. Hitchcock, ambassador to Russia, June 23, 1898, For. Rel. 1898, 540.

See, in relation to this case, Mr. Adey, Second Asst. Sec. of State, to Mrs. Siegel, Nov. 8 and Nov. 11, 1897, 222 MS. Dom. Let. 284, 362; Mr. Sherman, Sec. of State, to Mr. Hitchcock, amb. to Russia, No. 8, Dec. 22, 1897, 17 MS. Inst. Russ. 652; Mr. Hay, Sec. of State, to Mr. Tower, amb. to Russia, No. 125, Feb. 12, 1900, 18 MS. Inst. Russia, 252.

The Department of State, in its application of the rule requiring of an applicant for a passport, not indeed "a statement of a fixed date of return, but the manifestation of a fixed intention to return, within some reasonable time, which intention shall not be conspicuously negatived by the circumstances of the foreign domicile of the claimant," is "always well disposed towards those Americans, whether by birth or naturalization, who sojourn abroad in representation of American commercial interests."

Mr. Hay, Sec. of State, to Mr. White, chargé at London, No. 1095, Feb. 23, 1899, MS. Inst. Gr. Br. XXXIII. 97.

#### 8. MISSIONARIES.

##### § 521.

The Rev. Hugo Praessar was born in Germany in 1833, emigrated to the United States in 1868, and was naturalized in September, 1876. Three days later he obtained a passport and went to Europe. He subsequently paid several visits to the United States, on one occasion remaining more than two years. He last left the United States in 1883. His occupation was that of a missionary priest. In 1889 he applied to the American legation in Vienna for a passport, stating that it was his purpose to take charge of a convent in Roumania for the larger part of the next two years, and then to return to the United States. The Department of State said: "It is thought that the absence of Mr. Praessar from the United States is satisfactorily explained on grounds consistent with the retention by him of the

character of an American citizen. The nature of his labors renders the place of his residence uncertain and changeable, and tends to negative the inference which ordinarily might be drawn from a prolonged absence from the United States. The Department is, therefore, of opinion that it is proper to issue him a passport."

Mr. Blaine, Sec. of State, to Mr. Grant, min. to Austria-Hungary, No. 42, Jan. 22, 1890, MS. Inst. Austria-Hungary, III. 525.

"In respect to American-born citizens, residing abroad as missionaries in the employ of an American society, the Department is disposed to relax some of the requirements as to domicile and fixity of intention to return to the United States as defined in the application blanks."

Mr. Foster, Sec. of State, to Mr. Newberry, No. 357, July 21, 1892, MS. Inst. Turkey, V. 369.

The instructions of the Department of State in relation to the passport applications of American missionaries in China, as well as in other countries where the United States exercises extraterritorial jurisdiction, "have taken the ground that the vocation of the missionaries employed by societies established in the United States may not admit of any very positive declarations of intention to return to the United States," but that "some declaration of a more or less floating or indefinite character," "displaying the intent to return, is necessary." The Department "can not authorize the issuance of a passport upon any declaration tantamount to the expression of an intention not to return." But it was held that a declaration might be made in the following form: "I was, before coming to China, domiciled at ———, in the United States, and I have not assumed any other legal domicile, but I have come to China to engage in missionary work under the auspices of ———, a society organized and residing at ———, in the United States."

With regard to this declaration, for use in China, the following explanation was made:

"This declaration may be accepted equally well from a naturalized citizen as from a native. As a Chinaman can not be naturalized in the United States, the deduction naturally following return to and continued domicile in the country of origin can not exist within your jurisdiction."

Mr. Adee, Act. Sec. of State, to Mr. Denby, min. to China, No. 1470, July 20, 1897, MS. Inst. China, V. 460.

See Mr. Foster, Sec. of State, to Mr. Denby, min. to China, No. 737, July 18, 1892, For. Rel. 1892, 124.

"I have to acknowledge the receipt of your dispatch, No. 283, of the 28th of November, inclosing passport application of Logan Her-

bert Roots and Oliver Tracey Logan, medical missionaries, which you have declined to grant on the ground that they do not state intention to return to the United States, but, on the contrary, expressly state their expectation to remain permanently in China, and also inclosing correspondence with the United States consul at Hankow on the subject, showing a difference of views between your legation and the consulate as to the propriety of issuing the passports in question under the Department rules.

"A late instruction, which is applicable to the case under discussion, may be found in that paragraph of the Department's circular instruction of March 27, 1899, reading:

" 'The status of American citizens resident in a semibarbarous country or in a country in which the United States exercises extraterritorial jurisdiction is singular. . . . Their residence may be indefinitely prolonged, since obviously they can not become subjects of the native Government without grave peril to their safety. The Department's position with respect to these citizens has uniformly been to afford them the protection of a passport as long as their pursuits are legitimate and not prejudicial to the friendly relations of this Government with the Government within whose limits they are residing.'

"The pursuits of a missionary, properly conducted, are legitimate, and American missionaries of good standing have always enjoyed continuous protection from this Government in China. In 1894 Mr. Gresham said:

" 'Our legations have been authorized to issue passports to missionaries in foreign lands whose residence there was continuous and practically permanent, and who could not allege any definite intention of returning to, and residing in, the United States.' (The American Passport, p. 209.)

"These are merely instances of instructions of the same character which have been often repeated, and which may be found upon consulting the volumes of Foreign Relations. Their substance is adequately compressed in the instruction of Mr. Cridler, the Third Assistant Secretary of State, to the consul at Hankow, dated September 4, 1899, and quoted by the consul in the correspondence you submit. Mr. Cridler said:

" 'Recognizing that such of our citizens who have gone to China to pursue their religious calling may not return, but continue their work indefinitely abroad, the Department is disposed to sanction their receiving passports on taking the oath of allegiance.'

"It is true that in the Department's circular instruction of September 26, 1899, on the subject of passports and intent to return to the United States, the words quoted in the legation's letter of November 27, 1899, to the consul at Hankow occur: 'A passport should not issue

this Department is unable to perceive upon what ground it could ask foreign governments to recognize those passports as valid after that period, provided there has been opportunity to obtain new ones. A passport is evidence of citizenship, and as such is entitled to recognition as long as it remains in force; but if this Government decides that its passports are not valid for more than two years, it must be held to mean that they are not to be internationally used as evidence of citizenship after that time; and this being so, the Department is unable to see how it could ask the authorities of foreign countries, in which alone passports are required or intended to be used, to recognize them as valid evidence after they have ceased to be so by our own express regulations.

“The refusal of a foreign government, under these circumstances, to recognize an extinct passport is not a denial of American citizenship or of any of its incidental rights, but merely a requirement of proper evidence of such citizenship.

“In the case of Switzerland this requirement is strengthened by Article IV. of the treaty of 1850, in which it is provided that passports or other evidences of nationality of citizens of the two countries shall be ‘furnished or authenticated by a diplomatic or consular agent of their nation residing in the one of the two countries which they wish to inhabit.’

“It has been seen that an American passport more than two years old can not be authenticated either by a diplomatic or a consular agent of the United States; consequently, if this Department should contend that the Swiss authorities ought to recognize American passports more than two years old, it might be placed in the position of asking those authorities to recognize as valid passports neither furnished nor authenticated by the diplomatic agent or by any consular officer of the United States in Switzerland.

“You will therefore inform citizens of the United States seeking instruction on the subject that, under the regulations of the Department of State, made pursuant to law, passports are good for two years from their date, and no longer, and that this Government can not ask foreign governments to recognize American passports more than two years old.”

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switz., No. 80, March 28, 1887, For. Rel. 1887, 1060.

“By a circular issued September 1, 1873, the Department ordered that the duration of passports should be limited to two years from the date of their issuance, and this ruling has been in force ever since. One of the objects of prescribing it was to secure at reasonable intervals evidence of the conservation of American citizenship by persons residing indefinitely abroad. Under the law (section 2000, Revised

Statutes of the United States) naturalized and native-born citizens are required to receive from this Government the same protection of persons and property while they are abroad. It would, therefore, be obviously improper for this Government to make a distinction in favor of native-born citizens in the duration of its passports."

Mr. Hill, Assist. Sec. of State, to Mr. Clarke, Nov. 4, 1898, For. Rel. 1899, 88.

## 2. CANCELLATION.

### § 524.

Where a passport was issued to a Prussian subject, on the strength of erroneous representations that he was a citizen of the United States, the person who obtained it for him was requested to return it; and, as he failed to comply with the request, possibly because the holder had sailed for Europe, the American minister at Berlin was instructed to make the "necessary explanations to the Prussian Government."

Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 3, Jan. 20, 1854, MS. Inst. Prussia, XIV. 210.

A person obtained a passport from the Department of State on an application in which he swore that he was a naturalized citizen of the United States. He subsequently became involved in difficulty with some of the German authorities and invoked the protection of the United States, when the fact was discovered that he was not a citizen, but had only declared his intention to become one. The American consul-general at Frankfort was instructed to obtain the passport and return it to the Department to be cancelled, which was done. The individual then brought a suit against the consul-general for damages. The facts were communicated to the proper authorities in the United States, in order that criminal proceedings might be taken against the person in question, in case of his return.

Mr. Cass, Sec. of State, to Mr. Hillyer, Solicitor of the Treasury, March 1, 1860, 52 MS. Dom. Let. 2.

The proper course with regard to expired passports is to draw two or three pen strokes through the signature and write "cancelled" across the face of the document, in bold letters, and then return it to the holder.

Mr. Bayard, Sec. of State, to Mr. Winchester, min. to Switz., No. 111, Dec. 15, 1887, For. Rel. 1888, II. 1512.

In the case of Hercules A. Proios, who was held not to be entitled to the protection of the United States legation in Constantinople,



the legation was instructed to take no action beyond the withholding of recognition of his alleged American citizenship "and the cancellation of his passport."

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, Oct. 26, 1888, For. Rel. 1888, II. 1620.

Where it appeared that a passport had twice been issued to a person who had not at the time of his naturalization fulfilled by six months the condition of five years' residence in the United States, the Department of State said: "You will cancel the passport heretofore issued by you to Mr. Heidenheimer, and you will return hither the passport issued to him in 1871 by this Department."

Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, Dec. 8, 1888, For. Rel. 1888, I. 565.

Where a qualified passport was issued to a person whose retention of American citizenship was doubtful, it was held that, there being no authority for the issuance of such a passport, it should be "recalled and cancelled." (Mr. Bayard, Sec. of State, to Mr. McLane, min. to France, May 7, 1888, For. Rel. 1888, I. 534.)

June 6, 1899, John Wilson obtained a passport from the legation of the United States at Vienna on an application in which he swore that he was born in Virginia City, Nevada. The legation afterwards learned that he had been arrested on criminal charges. This circumstance led to inquiries by which the legation ascertained that he had previously obtained a passport at Paris by swearing that he was born at Bloomington, Illinois, and it appeared that he stated to the Austrian court before which he was arraigned that he was born in Chicago. It also appeared that he had five *aliases* and that he had previously been convicted at Vienna of crimes of fraud and theft. The legation obtained his passport from the judicial authorities and cancelled it, and sent it to the Department of State.

For. Rel. 1899, 77.

"The retention of an applicant's former passport in case of a refusal to issue a new one is, under the Department's instructions, warranted when the facts elicited show that the holder has been illegally naturalized, and is therefore wrongfully in possession of such formal certification of citizenship. To retain a regularly issued passport when no fraud appears, and when its return is demanded by the party, is a doubtful proceeding, it being the property of the holder."

Mr. Hay, Sec. of State, to Mr. Storer, min. to Belgium, Feb. 4, 1899, For. Rel. 1899, 84, 85-86.

## VII. INTERNATIONAL EFFECT.

## 1. EVIDENTIAL FORCE.

## § 525.

"This Government has a right to ask that if citizens of the United States, who are traveling with regular passports, or what appear to be such passports, happen to fall under unjust suspicions, every facility will be granted to them to vindicate their innocence. The refusal to let friends communicate with them while under arrest, or to let them appeal to our consuls and ministers, was an illiberality of treatment on the part of subordinate officials that can not but be reproved by the Executive Government of Switzerland. It is expected that they will take proper steps to prevent this in future."

Mr. Marcy, Sec. of State, to Mr. Fay, No. 16, Oct. 4, 1854, MS. Inst. Switz. I. 20.

"Your predecessor was instructed that we would not in any instance allow the sufficiency or supremacy of a passport to be questioned by Mexican authorities. Such a proceeding would clearly constitute an international case."

Mr. Fish, Sec. of State, to Mr. Foster, No. 43, Oct. 31, 1873, MS. Inst. Mex. XIX. 37.

This instruction related to the action of the Mexican authorities in Sonora in exacting a tax for exemption from military service of a citizen of the United States, on the ground that he had not *matriculated*.

"A certificate of naturalization and the possession of a passport are presumptive proof, in the absence of other evidence, that the person named therein is a citizen of the United States. If he has not forfeited his right to be so regarded he remains such. The question in each case must be decided by the facts peculiar to it, and should be investigated and decided by the officer to whom the application is made. Where the facts have been investigated and doubt exists, a reference may be made to this Department."

Mr. Fish, Sec. of State, to Mr. Davis, Dec. 22, 1874, MS. Inst. Prussia, XV. 581.

"The pretension of that Government [Mexico], too, to ignore the passport of this Department, and to require an inspection of the certificate of the naturalization of an alien, cannot be acquiesced in. You will distinctly apprise the minister for foreign affairs to that effect, and will add that this Government will expect to hold that of Mexico accountable for any injury to a citizen of the United States which may be occasioned by a refusal to treat the passport of this Department as sufficient proof of his nationality. . . .

"The assumption by the Mexican Government of a right to inspect and decide upon the validity of certificates of naturalization issued by these numerous courts in preference to receiving the proof afforded by a passport of this Department must be regarded as wanting in proper courtesy to the Government of a friendly power.

"It may also be remarked that there are many citizens of the United States who were neither born such nor naturalized in the ordinary way. These were naturalized by treaties with foreign powers, and not a few of them by treaties between the United States and Mexico. If these should visit the Mexican Republic, they will have no such certificate of naturalization as is granted to natives of other countries naturalized here. The only guarantee of nationality in their case would be a passport from this Department."

Mr. Evarts, Sec. of State, to Mr. Foster, June 16, 1879, MS. Inst. Mex. XIX. 593.

A passport and not a certificate of naturalization is the proper *prima facie* evidence of the holder's right to protection as a citizen of the United States while residing abroad.

Mr. Olney, Sec. of State, to Mr. Risley, min. to Denmark, Nov. 28, 1896, For. Rel. 1897, 118.

In 1892 a person bearing a passport as Jacob Goldstein, a naturalized citizen of the United States, was arrested and imprisoned at Kharkov, Russia, under § 977 of the penal code, on a charge of having entered Russia with a false passport, it being alleged that his real name was Yankel Klotow. Subsequently the Russian legation at Washington presented Goldstein's passport and certificate of naturalization to the Department of State, with an inquiry as to their genuineness. The Department of State objected to this procedure, saying that as passports issued by the Secretary of State, under the seal of the Department, were "prima facie evidence of the facts therein certified," the purpose for which they were issued "would be defeated were foreign authorities at liberty to disregard them till certified anew by the issuing authority;" that "their examination and visé is properly the function of the legation of the United States in the country where the bearer may chance to be;" and that, in the case under consideration, while the ascertainment of the genuineness of the papers would neither prove nor disprove the alleged false impersonation of the bearer, the sending of them to Washington would seem to have restrained him of his liberty several weeks longer than if a seasonable application had been made to the legation at St. Petersburg for the desired information. In conclusion the Department said: "You may say to the minister of foreign affairs that where there may be good ground to believe a passport has been forged or tampered with, or is held by another than the person to

whom it was lawfully issued, your legation will cheerfully render assistance so far as an examination of the authority [authenticity] of the document is concerned, and will, in case of need, refer the matter to this Department, but that otherwise it is the just expectation of this Government that its passports will be duly respected abroad as *prima facie* evidence of the facts therein stated, and that its validity is only to be traversed by competent proof."

Mr. Foster, Sec. of State, to Mr. White, min. to Russia, Nov. 26, 1892, For. Rel. 1893, 530.

The Russian foreign office received these representations "in a very satisfactory manner, assuring me that in future such cases would be referred to the American legation here and not to the State Department at Washington." (Mr. White, min. to Russia, to Mr. Foster, Sec. of State, Dec. 15, 1892, For. Rel. 1893, 531.)

The case of Goldstein was disposed of by his acquittal by the local court at Kharkov, and his immediate departure. (For. Rel. 1893, 541, 543.)

By art. 977 of the Russian Penal Code, "whoever falsely transfers his passport to another, that the latter may live under its protection, or that the latter may pass the frontier, and also whoever passes from one place to another by means of such a modified or falsified passport, is subject to imprisonment from two to four months or to arrest from three weeks to three months." (Mr. Smith, min. to Russia, to Mr. Blaine, Sec. of State, No. 20, July 5, 1890, 41 MS. Desp. from Russia.)

"The real grievance in the case is . . . the refusal of the Austro-Hungarian authorities to accord respect to the passport, duly issued by the lawful agencies of the United States, as *prima facie* attestation of the citizenship of the bearer, and therefore of his treaty rights. . . . The passport and naturalization certificate of Benich have been equally disregarded by the judicial and military authorities, who seem to have been left free to take whatever course they chose, to independently ascertain the citizenship of the party. . . . The Austro-Hungarian officials appear to proceed on the intolerable assumption that a foreign passport is valueless as evidence *per se*, and that the true citizenship of an alien found within Austrian jurisdiction is to be ascertained by some independent municipal investigation having no regard whatever to international obligations. This assumption is wholly incompatible with the universally admitted doctrine that a state is the sole and ultimate judge of the citizenship of its own dependents, and is, in its sovereign capacity, competent to certify to the fact. A passport, in the eye of international law, is one of the highest sovereign acts of a state, whereby it attests that the holder is a lawful citizen. In the nature of the case it must be assumed to be *prima facie* valid until shown to be otherwise. . . . It is neither incumbent upon the bearer to prove his citizenship by extraneous evidence at the will of the country of his sojourn; nor upon the certifying government to support its

official attestation of the fact of the citizenship by collateral proof under the municipal requirements of another country. . . . Should the Austro-Hungarian authorities have reason to believe that they [passports] are fraudulently held by others than the persons to whom they were lawfully issued, or that the holders have obtained naturalization in fraud of the laws of the United States, or claim privileges of citizenship not granted by the treaty of naturalization between the two countries, the facts should at once be brought to the notice of the Government of the United States through its accredited envoy in Austria-Hungary. . . . It is hoped that the incident will have been satisfactorily terminated before this reaches you by the full release of John Benich; by the disavowal of the contempt shown by the Croatian authorities for the sovereign acts of the United States under our treaty with Austria-Hungary; by a frank expression of regret; and by the adoption of measures to prevent the recurrence of so vexatious a class of questions and to dispose of any doubtful cases of citizenship by the cooperative action of the legation and the foreign office."

Mr. Gresham, Sec. of State, to Mr. Tripp, min. to Austria-Hungary, Sept. 4, 1893, For. Rel. 1893, 23, 24.

It appeared that Benich, a native of Croatia, who was duly naturalized in the United States, in conformity with the requirements of the naturalization treaty with Austria-Hungary of Sept. 20, 1870, was, while on a visit to his former home, arrested, about May 16, 1893, at Novi, in Croatia, and held for military duty. He had a passport issued by the United States legation at Vienna, April 15, 1893. The consular agent of the United States at Fiume intervened in his behalf with the local authorities, and particularly with the military recruiting commissioner at Fiume, who replied that "he does not recognize the convention of September 20, 1870, and neither the authority of the U. S. consular officer." The judicial authorities took the same view, and Benich was escorted to Pola to perform military service. The case was then taken up by the United States legation at Vienna, with the result that by a telegraphic order of the Hungarian minister of defense he was temporarily discharged from active service, but the final erasure of his name from the rolls was reserved till "full information" should be received as to his American citizenship, although his passport and certificate of naturalization had been submitted, in original and translation, to the judge at Novi, May 17, 1893. It was with reference to this situation that the foregoing instruction was written. (For. Rel. 1893, 15, 23.)

See, also, the case of Edward Drucker, For. Rel. 1893, 1.

In the case of Charles Mercy, alias Saul Moerser, an arrest was made on the charge of evasion of military duty and of embezzlement previous to naturalization. The former charge was withdrawn on production of evidence of naturalization, and Mercy was released on bond on the charge of embezzlement. He seems to have forfeited his bail and quitted the country. (For. Rel. 1893, 5, 13, 14.)

See Mr. Hay, Sec. of State, to Mr. Harris, No. 59, Jan. 5, 1900, MS. Inst. Austria, IV. 444.

The views set forth in Mr. Gresham's instructions to Mr. Tripp of Sept. 4, 1893, *supra*, were fully communicated to Count Kalnoky by Mr. Tripp in a note of September 26, 1893. A full response was made by the Austrian foreign office, in which the principle contended for by the United States was fully conceded. The reply of the foreign office was based upon and embodied a report of the governor of Croatia, in which it was stated—

1. That the members of the enrollment commission were not justified in refusing to recognize Benich's certificate of naturalization and passport, or in declining "to respect them as legal documentary proof," but that they should have taken cognizance of the papers and of the protest of the United States consular agent at Fiume and have cancelled Benich's enrollment, and then have submitted their suspicions as to the authenticity of the papers to the competent authorities for decision.

2. That by failing to show either to the papers or to the remonstrance of the consular agent the respect which was due them, they had rendered themselves liable for a violation of official duty, for which proceedings against them would be taken, although they had been governed by the belief that Benich was still a Hungarian subject and not by any intentional disrespect to the provisions of the treaty or to the representative of a friendly government.

3. That the position maintained by the United States as to the necessity that papers issued by the competent authorities of one country should be respected and recognized by the authorities of another unless the documents bore "unmistakable proofs of having been counterfeited or otherwise obtained by fraud," was fully concurred in, and that the governor of Croatia had instructed all his subordinate officers to act in future in conformity with this principle.

Mr. Tripp, min. to Austria-Hungary, to Mr. Gresham, Sec. of State, Aug. 23, 1894, *For. Rel.* 1894, 36, 44, enclosing copy of a note of Count Welsersheimb of Aug. 18, 1894.

In March, 1895, Solomon Czosnek, who bore a passport from the Department of State at Washington, was, on his arrival at Chrzanow, in Galicia, summoned to appear for military duty. In reply, he submitted his passport, and claimed American citizenship. On the 1st of May he was arrested, and held to answer the criminal charge of illegally abstaining from fulfilling military duty. To this charge he made the same answer. It appeared that he was born in Galicia in April, 1872, but emigrated in 1878 to America with his father, who was duly naturalized in 1888. Solomon was then sixteen years of age, and he continued to reside in the United States till January, 1895, when he revisited Austria on a matter of business. Mr. Tripp, minister of the United States at Vienna, in presenting the case to the

foreign office, May 23, 1895, called attention to the case of John Benich and Count Welsersheimb's note of August 18, 1894. Mr. Tripp repeated the assurance which he gave in that case that, if a question should arise as to the identity of the bearer of a passport, or as to fraud in the procurement of it, the legation would be ready "to aid in causing the allegations and complaints to be immediately investigated by the authority from which the document issued, to the end, in all cases when the charges are sustained, that the document may be cancelled and the bearer of the same be convicted and punished;" but he declared that his Government "must insist, where its passport, bearing upon its face an apparent validity, is presented to the local authorities of your Government, that it must be respected as such, without subjecting its bearer to months of delay and great expense in proving and determining the facts of which the paper is *prima facie* evidence and, as to the local authorities to whom it is presented, the best evidence."

The Austrian Government replied that the accused was not deprived of his liberty, but was allowed to move about freely; that the case was still pending, and that the ministry of public defence was unable to act before judgment had been passed, especially as it must be ascertained whether the person in question was the legitimate son of the father who emigrated to the United States and became a citizen thereof. With this reply there was enclosed a statement of the district attorney, giving the reasons for holding the man to answer before the courts, and containing the following clause: "In view of the fact, however, that the accused, although he emigrated before he was liable to military duty, received no permit from the ministry of public defence (par. 64 of military law), or at least can not produce one, it can not be assumed that he is exempt from military duty, even if he be provided with a United States passport." Mr. Tripp protested against this view.

The foreign office, July 22, 1895, subsequently reported that the state attorney, after having convinced himself of the lawful naturalization of Czosnek in the United States and of the genuineness of the passport and his identity, had instructed the district attorney to withdraw the charges against him, and to cause the passport, which was among the papers taken from him at the time of his arrest, to be returned to him. Moreover, the foreign office, accepting the position taken by the United States, further declared that the state attorney had "informed the district attorney that the proceedings instituted by the latter in the premises were not in conformity with the existing regulations, and has at the same time instructed the authorities under his jurisdiction to act in future in strict compliance with the provisions of the treaty of September 20, 1870, and with the views expressed by the honorable envoy of

the United States regarding the *prima facie* evidence of foreign and American passports and documents proving the identity of persons."

The Department of State, in referring to the termination of the case, replied that the precedent was "a valuable one, because in the Benich case and other cases the authorities of Austria-Hungary, while admitting that a passport of a friendly nation is *prima facie* evidence of citizenship and must be respected by administrative officers, have suggested that judicial officers might act in disregard of it. In this case you contended that when there is no charge of fraud in the procurement of a passport, or as to the identity of the person presenting it, it must be respected by judicial as well as administrative officers, and the correspondence shows that this view was shared by the Austro-Hungarian minister."

Mr. Tripp, min. to Aust. Hung., to Count Goluchowsky, min. of foreign affairs, May 23, 1895, For. Rel. 1895, I. 14, 15-16; same to same, June 27, 1895, id. 17; Mr. Pasetti, for the foreign office, to Mr. Tripp, July 22, 1895, id. 19; Mr. Adey, Act. Sec. of State, to Mr. Tripp, Aug. 12, 1895, id. 19, 20.

May 1, 1895, Mr. Hengelmüller, minister of Austria-Hungary, transmitted to the Department of State a passport, which had been issued by it, for the purpose of ascertaining whether the bearer, from whom it had been taken in Austria, had "really become a citizen of the United States," so as to be exempt from military duty under the treaty of September 20, 1870.

The Department of State replied that no previous instance was recalled of such a reference to it on the part of the Austro-Hungarian Government, and that it would be much regretted were it to form a precedent, since passports issued by the Secretary of State under the seal of the Department would fail of their purpose if foreign authorities were at liberty to disregard them till certified anew by the issuing authority. Attention was drawn to the correspondence between the two Governments in 1893, and particularly to the instruction of Mr. Gresham to Mr. Tripp, September 4, 1893, *supra*, and to the note of Count Welsersheimb to Mr. Tripp of August 18, 1894, admitting "the necessity that papers issued by the competent authorities of one country should be respected and recognized by the authorities of a third state as long as these documents do not bear unmistakable proofs of having been counterfeited or otherwise obtained by fraud." Having thus reaffirmed its views, the Department stated, without prejudice to its position, that the passport was duly issued upon proof that the applicant had been lawfully naturalized after more than five years' residence in the United States.

Mr. Hengelmüller, Austro-Hungarian min., to Mr. Gresham, Sec. of State, May 1, 1895; Mr. Uhl, Act. Sec. of State, to Mr. Hengelmüller, May 8, 1895: For. Rel. 1895, I. 8, 9.



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## PASSEPORTS.

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*In an instruction to Mr. Tripp of May 9, 1896, Mr. Uhl drew attention to the instruction to Mr. White, at St. Petersburg, Nov. 26, 1892, supra. See, also, Mr. Hay, Sec. of State, to Mr. Harris, No. 59, Jan. 5, 1900, MS. Inst. Aust. IV. 444.*

March 25, 1896, Mr. Tripp reported that the cases of arrest of naturalized citizens of the United States in Austria for failure to perform military duty had become quite infrequent, as the local military authorities of the different provinces had instructions from the foreign office to give to American passports the credit to which they were entitled. A naturalized citizen of the United States, if arrested, was immediately released on the presentation of his papers, without recourse to a consul or to the legation itself, unless some peculiar facts existed in the particular case.

For. Rel. 1896, 4-5.

Complaint was made by Mr. Leopold Rieder, of Newark, N. J., that the Austrian authorities took possession of his passport and refused to return it, notwithstanding his frequent requests for it. On investigation it appeared that Rieder, when summoned before the military authorities in Galicia, did not appear in response to the summons, but instead gave up his passport, saying that that would explain the situation. Pending an investigation he returned to America, and when the magistrate ordered his passport to be returned to him he could not be found. The Austrian Government therefore turned over his passport to the United States legation in Vienna. Mr. Tower, United States minister, said that if Mr. Rieder had consented to appear and make a statement to the magistrate when he was summoned, he would have saved himself much annoyance and would have had his passport returned to him without delay.

For. Rel. 1897, 5-7.

In connection with the principle laid down in Benich's case, the following correspondence is to be noticed:

By the naturalization treaties between the United States and the German States (just as by that between the United States and Austria-Hungary) both naturalization and residence of five years are required as conditions of recognized change of allegiance. Acting upon these stipulations, the Würtemberg authorities, in 1894, demanded of one Seifried, who had been arrested for failure to perform military service, independent proof, apart from his passport and certificate of naturalization, that he had uninterruptedly resided in the United States for five years, and, pending the production by him of such proof, admitted him to bail. He was afterwards released on showing that he had continuously resided in the United States thirteen years.

With regard to this case, the Department of State observed that, although the fact of naturalization in the United States implied in the great majority of cases a continuous five years' residence, it did not imply such residence in all cases—e. g., minors, honorably discharged soldiers, merchant seamen, etc., naturalized under special provisions of law on less than five years' residence; that a passport, as a certificate of citizenship, did not disclose the statute under which the naturalization was effected, nor, in view of the varied and deficient forms of naturalization certificates and of other matters of record, on which the passport was issued, could it practically be made to do so; and that the question was further complicated by the circumstance that, even if the naturalization was effected under one of the statutes requiring less than a five years' residence, the person so naturalized was, after completing such residence, treated as having fulfilled the conventional conditions. In consideration of these things, and "in the absence . . . of disrespect to the passport itself, as *prima facie* evidence of citizenship, or of any apparent purpose on the part of the governments of Germany to question the fact of naturalization when duly certified to have been performed in accordance with the statutes of the United States, it may not be easy," said the Department of State, "to dispute the claim of those States, under existing naturalization treaties, to ascertain by some separate process whether the conjoint requirement of those treaties in respect to residence has been fulfilled. We can not, of course, admit any impugnement whatever of the validity and sufficiency of a passport as a *prima facie* certification of the fact of lawful citizenship, nor could we acquiesce in any proceedings in determination of the residential condition which would impose undue hardship upon the individual or exact of him proof of statutory naturalization, for this latter is abundantly covered by this Government's formal certification of the fact of lawful citizenship. We certainly could not question the competency of a German court to admit and pass upon proof of five years' total residence in the United States in the case of those persons acquiring our citizenship in less time and as to whom this Government might not be able to certify to the duration of any other part of their period of residence than that which antedated naturalization, and if thus admissible, and in such a case even necessary as to a part of the five years, the claim as to the whole period can not readily be contestable.

"The newspapers recently published a telegraphic item reporting a decision by the imperial supreme court in Saxony which appears to relate to the present subject. If not already done, you will report to the Department the facts and circumstances of that decision. In the meantime, or until otherwise instructed, you may suspend action upon

the Department's No. 238 and No. 445, unless it should appear that the courts go behind the passport as *prima facie* evidence of the fact of citizenship and require the bearer to prove naturalization. As stated in the instructions to the United States minister at Vienna, to which those dispatches refer, the attestation of citizenship contained in the passport can only be traversed by allegation of unlawful acquisition of citizenship, in which case it is the right and duty of the naturalizing Government to determine whether the party be or be not rightfully one of its citizens."

Mr. Olney, Sec. of State, to Mr. Jackson, chargé at Berlin, No. 544, Feb. 13, 1896, For. Rel. 1895, I. 520, 522-523.

See, also, Mr. Uhl, Act. Sec. of State, to Mr. Runyon, amb. to Germany, No. 238, March 11, 1895, For. Rel. 1895, I. 516; Mr. Olney, Sec. of State, to Mr. Runyon, No. 445, Oct. 14, 1895, *id.* 517; Mr. Runyon to Mr. Olney, No. 440, Dec. 23, 1895, *id.* 519.

As a general rule, a passport granted by the Secretary of State is not evidence in a court of justice [in the United States] that the person to whom it was given was a citizen of the United States.

*Urtetiqui v. D'Arbel*, 9 Pet. 692.

## 2. Visé.

### § 526.

"Some foreign countries, before recognizing the validity of a passport, require that a visa, or visé, shall be, or shall have been, affixed to it. This is an endorsement denoting that the passport has been examined and is authentic, and that the bearer may be permitted to proceed on his journey. Sometimes it is required that the visa be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought. It may even be required from a diplomatic or consular officer of the government which issued the passport."

Hunt's Am. Passport, 5.

See Dana's Wheaton, 298, n., there cited.

The visé is affected by endorsing the words "Good for \_\_\_\_\_," the blank being filled by the name of the traveler's country of destination or sojourn; or the single word "Good" may do. (Mr. Hay, Sec. of State, to Mr. Harris, No. 59, Jan. 5, 1900, MS. Inst. Austria, IV. 444.)

The legal charge for the visé of an American passport in Europe by a consular officer of the United States "is \$1.00, which can be charged only once in the same country."

Mr. Cass, Sec. of State, to Mr. Wilcox, Feb. 29, 1860, 51 MS. Dom. Let. 499.

"Passports are to be verified only by the consular officer of the place where the verification is sought, for which a fee of one dollar in the gold coin of the United States, or its equivalent, will be collected. In the absence of such consular officer, or should the foreign government refuse to acknowledge the validity of the consular visé, it may be given by the principal diplomatic representative. A diplomatic representative or his secretary of legation may, however, verify passports presented to him when there is no consulate of the United States established in the city where the legation is situated. A consular agent may visé but can not issue a passport. . . .

"No visé will be attached to a passport after two years from its date. A new passport may, however, be issued in its place by the proper authority, as hereinbefore provided, if desired by a holder who has not forfeited citizenship."

Printed Personal Instructions to Dip. Agents, 1885, See U. S. Cons. Reg., 1881, § 164.

The legislation of the United States does not require a consular officer to visé foreign passports; but, if desired to visé such a passport, he may do so as a matter of courtesy, as had been the practice in Greece. (Mr. Cridler, Third Assist. Sec. of State, to Mr. McGinley, No. 6, May 21, 1898, 162 MS. Inst. Consuls, 14.)

If a consular officer of the United States is asked by the foreign authorities whether a paper purporting to be an American passport is genuine, he may reply by letter, saying, if the case warrants it, that the form of the paper and its signature and seal are to the best of his knowledge, regular and genuine; and for such an answer he is to charge no fee. If the ordinary consular visé be desired on an American passport, he will affix it upon payment of the prescribed fee. (Mr. Hay, Sec. of State, to Mr. Harris, No. 59, Jan. 5, 1900, MS. Inst. Aust.-Hung. IV. 444.)

General Otis having desired that the American consul at Singapore should visé the passports of all passengers for the Philippine Islands, including those of foreigners, it was decided to permit the consul to endorse foreign passports with the word "Seen," together with the date and his signature. To this endorsement he was to affix his official seal; and he was also to collect the official fee prescribed for viséing a passport, and turn it into the Treasury in the usual manner.

Mr. Ades, Second Assist. Sec. of State, to Mr. Moseley, Jr., consul at Singapore, No. 16, Sept. 21, 1899, 169 MS. Inst. Consuls, 317.

See Mr. Cridler, Third Assist. Sec. of State, to Mr. Moseley, Jr., Sept. 6, 1899, id. 206.

"No one is admitted to Russia without a passport. It must be viséed by a Russian diplomatic or consular representative. Upon entering Russia it should be shown at the first Government house, and the holder will be given another passport or permit of sojourn.

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# PASSPORTS

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*At least twenty-four hours before departure from Russia this permit should be presented and a passport of departure will be granted and the original passport returned. A fresh permit to remain in Russia must be obtained every six months."*

Notice of Department of State, Aug. 1, 1901, For. Rel. 1901, 453.

As to the requirements of the Russian Government that foreign ecclesiastics desiring to enter Russia must have the special authorization of the Ministry of the Interior, see Mr. Wurtz, chargé at St. Petersburg, to Mr. Blaine, Sec. of State, No. 72, Dec. 16, 1889, 40 MS. Desp. from Russia. This dispatch related to the case of the Rev. Mr. Wright, whose passport the Russian consul-general at Constantinople refused to visé, in order that he might proceed through Russian territory to Persia. The Russian foreign office, as Mr. Wurtz reported, said that the authorization of the Ministry of the Interior was "readily and promptly granted, and to all who have not made themselves obnoxious by their attempts to proselyte from the orthodox faith, or against whom nothing objectionable is known; the authorization could in fact be telegraphed for from Teheran, Constantinople, or elsewhere."

See, however, For. Rel. 1895, I. 195, where it is stated that the Russian Government in 1891 refused to permit an American missionary to pass through Siberia en route from China to the United States, on the ground that no ecclesiastics were allowed to go through Siberia; and where it is also stated that, on the same ground, Count Cassini, Russian minister at Peking, in 1895 declined to grant permission (which was, however, subsequently accorded at St. Petersburg) for certain American missionaries in China to seek temporary asylum in Russian territory if it became necessary for the protection of their lives.

"Correspondence is on foot touching the practice of Russian consuls within the jurisdiction of the United States to interrogate citizens as to their race and religious faith, and upon ascertainment thereof to deny to Jews authentication of passports or legal documents for use in Russia. Inasmuch as such a proceeding imposes a disability, which in the case of succession to property in Russia may be found to infringe the treaty rights of our citizens, and which is an obnoxious invasion of our territorial jurisdiction, it has elicited fitting remonstrance, the result of which it is hoped will remove the cause of complaint."

President Cleveland, annual message, Dec. 2, 1895, For. Rel. 1895, I. xxxii.  
See Jurisdiction, *supra*, § 175.

April 21, 1904, the House of Representatives resolved "that the President be requested to renew negotiations with the governments of countries where discrimination is made between American citizens on the ground of religious faith or belief to secure by treaty or otherwise uniformity of treatment and protection to American citizens holding passports duly issued by the authorities of the

United States, in order that all American citizens shall have equal freedom of travel and sojourn in those countries, without regard to race, creed, or religious faith." This resolution was communicated to the Russian Government, with an expression of a desire for the putting an end to the discriminations there prevailing "between different classes of American citizens on account of their religious faith."

Mr. Hay, Sec. of State, to Mr. McCormick, ambass. to Russia, No. 127, July 1, 1904, For. Rel. 1904, 790.

See Mr. McCormick to Count Lamsdorff, Aug. 22, 1904, id. 791.

See, also, President Roosevelt, annual message, Dec. 6, 1904.

Feb. 12, 1889, the Turkish minister at Washington informed the Department of State that the passports of travelers resorting to Turkey must be viséed by an Ottoman consular officer. This notification was published by the Department through the press and otherwise (Consular Reports, No. 103, March 1889). The Ottoman regulations then in force were understood to be satisfied by a visé in the country of last departure before entering the Turkish dominions. The Department hesitated to publish, lest it might seem thereby to sanction, a later notification that all passports of American travellers for Turkey were required to be viséed by the Turkish consul-general at New York.

Mr. Blaine, Sec. of State, to Mavroyeni Bey, Turkish min., Feb. 18, 1890, MS. Notes to Turkey, I. 520.

In 1888 the German Government made a regulation requiring all foreigners entering Alsace-Lorraine from France to have their passports viséed by the German embassy in Paris.

For. Rel. 1890, 316; Mr. Rives, Assist. Sec. of State, to Mr. Dirks, Jan. 14, 1889, 171, MS. Dom. Let. 319; Consular Reports, No. 94, June 1888, XXVI. 461.

Complaint having been made by William Trauver, an American citizen, of the refusal of the Austrian consul at Breila, Roumania, to visé his passport, the matter was brought to the attention of the Imperial and Royal Government, whose explanations were accepted as satisfactory. It appeared among other things that one of the reasons why the consul refused to visé the passport was that under the Imperial and Royal regulations the visé was required only in cases of Russian and Turkish passports, and this because of reciprocal agreement.

For. Rel. 1899, 52-60.

W., a citizen of the United States, bearing a passport from the Department of State, was expelled from Prussian territory in March

1894, on the ground that he was attempting to gain recruits for the Mormon sect, and was thus carrying on an agitation which was "not in harmony with the laws of the country." At the time of his expulsion, the police authorities at Sorau made on his passport the following endorsement: "Expelled from Prussian territory by direction of the Royal Government president at Frankfort on the Oder, of March 27, 1894." Of the expulsion no complaint was made; but, on the ground that the endorsement had "so impaired the value of the passport, not only in other parts of Germany, but everywhere else," that W. was compelled to take out a new one, Mr. Runyon, the ambassador of the United States at Berlin, requested the foreign office to "cause such directions to be given as to prevent in the future the making by any German official upon an American passport of any endorsement or statement except a visé." The foreign office replied: "Though the order of expulsion must . . . be maintained, the procedure of the police authorities of Sorau . . . , who have made a statement on the passport of Weiler, . . . can not be approved. Authority for Prussian officials to make statements of such a nature on passports of foreigners who have been expelled does not exist; the police authorities have acted of their own accord on this point . . . The Royal Prussian minister of the interior has taken steps to prevent for the future the making of such unallowable statements on passports."

Baron Rotenhan, to Mr. Runyon, Dec. 3, 1895, For. Rel. 1895, I. 541, replying to a note of Mr. Runyon of Sept. 2, 1895, id. 540.

The United States having protested against the act of the Russian consul at Königsberg, in making on the passport of a naturalized American citizen the endorsement that "the visé of the passport is refused, in view of the fact that the bearer of it has been naturalized in the States of North America without the permission of the Government," the passport being thus defaced and its usefulness impaired, the Russian Government replied that the necessary steps had been taken "to prevent the recurrence of such cases in future."

For. Rel. 1896, 517-519.

"By article 76 of the Portuguese consular code the captains of ships are obliged to present at the consulates or vice-consulates at the moment of their departure for Portuguese ports the necessary documents, as also the passports of passengers. If these latter are foreigners their passports must be viséed at the consulates or vice-consulates, but it is not required that all the passports should be made out by the consuls or vice-consuls. The visés for foreign passports amount to about 80 cents."

Viscount das Nogueiras, Portuguese min., to Mr. Bayard, Sec. of State, May 15, 1887, For. Rel. 1887, 927, 928.

This was written in reply to a note of Mr. Bayard's of May 11, 1887, to the Portuguese minister, calling attention to the statement of a firm in Boston that passengers bound for the Azores were required by the Portuguese vice-consul to provide themselves, before sailing, with Portuguese passports, at a cost of \$3.30 each.

See, also, Mr. Bayard, Sec. of State, to Mr. Lewis, min. to Portugal, No. 52, May 13, 1887, For. Rel. 1887, 935.

While the right of foreign governments to require passports is not disputed, yet with the exaction of heavy charges for visés may be a subject of international complaint.

Mr. Frellinghuysen, Sec. of State, to Mr. Foster, min. to Spain, March 12, 1884, MS. Inst. Spain, XIX. 504.

"In respect of the Spanish consular visé attached to a passport (in itself very onerous), it is noticeable that double the charge is made for the authentication of the passports of travelers from the United States than is imposed in the case of the optional visé of the passport of a traveler going to Cuba from Europe, and providing himself with that means of establishing his identity and right to courteous treatment. And still another discrimination appears, for certain foreigners, Germans in particular, going from our ports to Cuba, are favored by the collection of a lower fee for the visé of the Spanish consuls in the United States than American citizens are compelled to pay for the same service. Unreasonable and only applicable to a part of the foreign travel with Cuba, the passport system there is thus made an engine of an unfriendly discrimination."

Mr. Bayard, Sec. of State, to Mr. Muruaga, Span. min., May 19, 1886, MS. Notes to Spain, X. 420.

See, also, Mr. Bayard, Sec. of State, to Mr. Foster, min. to Spain, No. 336, May 6, 1885, For. Rel. 1885, 711; Mr. Foster to Mr. Bayard, No. 334, June 20, 1885, id. 726; Mr. Bayard to Mr. Foster, No. 390, Aug. 21, 1885, id. 751.

The Spanish minister, in an interview on June 11, stated that his government would "relieve citizens of the United States of the present unequal and discriminating charge of \$4 for the consular visé, as against the \$2 fee for the visé of German and other passports."

Mr. Bayard, Sec. of State, to Mr. Curry, min. to Spain, June 14, 1886, MS. Inst. Spain, XX. 230.

June 10, 1887, the Spanish minister stated that he had instructed Spanish consuls in the United States to furnish a visé to American citizens going to Cuba at a cost of \$1.

Mr. Muruaga, Span. min. to Mr. Bayard, Sec. of State, June 10, 1887, For. Rel. 1887, 1030, 1031.



In an instruction to Mr. Tripp of May 9, 1895, Mr. Uhl drew attention to the instruction to Mr. White, at St. Petersburg, Nov. 26, 1892, *supra*. See, also, Mr. Hay, Sec. of State, to Mr. Harris, No. 59, Jan. 5, 1900, MS. Inst. Aust. IV. 444.

March 25, 1896, Mr. Tripp reported that the cases of arrest of naturalized citizens of the United States in Austria for failure to perform military duty had become quite infrequent, as the local military authorities of the different provinces had instructions from the foreign office to give to American passports the credit to which they were entitled. A naturalized citizen of the United States, if arrested, was immediately released on the presentation of his papers, without recourse to a consul or to the legation itself, unless some peculiar facts existed in the particular case.

For. Rel. 1896, 4-5.

Complaint was made by Mr. Leopold Rieder, of Newark, N. J., that the Austrian authorities took possession of his passport and refused to return it, notwithstanding his frequent requests for it. On investigation it appeared that Rieder, when summoned before the military authorities in Galicia, did not appear in response to the summons, but instead gave up his passport, saying that that would explain the situation. Pending an investigation he returned to America, and when the magistrate ordered his passport to be returned to him he could not be found. The Austrian Government therefore turned over his passport to the United States legation in Vienna. Mr. Tower, United States minister, said that if Mr. Rieder had consented to appear and make a statement to the magistrate when he was summoned, he would have saved himself much annoyance and would have had his passport returned to him without delay.

For. Rel. 1897, 5-7.

In connection with the principle laid down in Benich's case, the following correspondence is to be noticed:

By the naturalization treaties between the United States and the German States (just as by that between the United States and Austria-Hungary) both naturalization and residence of five years are required as conditions of recognized change of allegiance. Acting upon these stipulations, the Würtemberg authorities, in 1894, demanded of one Seifried, who had been arrested for failure to perform military service, independent proof, apart from his passport and certificate of naturalization, that he had uninterruptedly resided in the United States for five years, and, pending the production by him of such proof, admitted him to bail. He was afterwards released on showing that he had continuously resided in the United States thirteen years.

With regard to this case, the Department of State observed that, although the fact of naturalization in the United States implied in the great majority of cases a continuous five years' residence, it did not imply such residence in all cases—e. g., minors, honorably discharged soldiers, merchant seamen, etc., naturalized under special provisions of law on less than five years' residence; that a passport, as a certificate of citizenship, did not disclose the statute under which the naturalization was effected, nor, in view of the varied and deficient forms of naturalization certificates and of other matters of record, on which the passport was issued, could it practically be made to do so; and that the question was further complicated by the circumstance that, even if the naturalization was effected under one of the statutes requiring less than a five years' residence, the person so naturalized was, after completing such residence, treated as having fulfilled the conventional conditions. In consideration of these things, and "in the absence . . . of disrespect to the passport itself, as *prima facie* evidence of citizenship, or of any apparent purpose on the part of the governments of Germany to question the fact of naturalization when duly certified to have been performed in accordance with the statutes of the United States, it may not be easy," said the Department of State, "to dispute the claim of those States, under existing naturalization treaties, to ascertain by some separate process whether the conjoint requirement of those treaties in respect to residence has been fulfilled. We can not, of course, admit any impugnement whatever of the validity and sufficiency of a passport as a *prima facie* certification of the fact of lawful citizenship, nor could we acquiesce in any proceedings in determination of the residential condition which would impose undue hardship upon the individual or exact of him proof of statutory naturalization, for this latter is abundantly covered by this Government's formal certification of the fact of lawful citizenship. We certainly could not question the competency of a German court to admit and pass upon proof of five years' total residence in the United States in the case of those persons acquiring our citizenship in less time and as to whom this Government might not be able to certify to the duration of any other part of their period of residence than that which antedated naturalization, and if thus admissible, and in such a case even necessary as to a part of the five years, the claim as to the whole period can not readily be contestable.

"The newspapers recently published a telegraphic item reporting a decision by the imperial supreme court in Saxony which appears to relate to the present subject. If not already done, you will report to the Department the facts and circumstances of that decision. In the meantime, or until otherwise instructed, you may suspend action upon

Safe conducts, in a form similar to that of special passports, have also been issued to aliens, especially as bearers of dispatches.

So, also, letters of safe conduct, commonly called passports, are given to foreign ministers traveling in or departing from the United States.

Hunt's Am. Passport, 7-35.

The following is an interesting example of a document partaking of the nature both of a safe conduct and a passport:

"To all whom these presents shall come, greeting:

"The bearer hereof, Baron Humboldt, a subject of His Prussian Majesty and member of the Royal Academy of Sciences of Prussia, with his secretary, Mr. Bonpland, being about to return from the United States, with forty boxes of plants and other collections relating to natural history, all his own property, by way of France to Berlin, from an expedition into South America and Mexico, undertaken at his own expense for the improvement of natural history: These are to require the commanders of all armed vessels of the United States, public and private, to suffer them to pass without hindrance, and in case of need to give them all necessary aid and succor in their voyage: and in consideration of the respect due to persons engaged in the promotion of useful science, they are in like manner recommended to the favorable attention of the officers, citizens, and subjects of all friendly powers.

"In faith whereof, I, James Madison, Secretary for the Department of State of the United States of America, have signed these presents and caused the seal of my office to be annexed hereto, at the city of Washington, this 23d day of June, A. D. 1804, and in the 28th year of the Independence of the said States.

(L. S.)

"JAMES MADISON."

14 MS. Dom. Let. 331.

"Within the last few years the subject of the issuance of special passports of this character [to unofficial citizens of the United States] has had careful examination; with the conclusion that they do not satisfy the statutory definition of a passport as regards the certification of citizenship. For such certification but one form of passport is authorized, and this the Department issues upon due proof of citizenship and payment of the prescribed fee. The special passport appears properly to be limited to the cases of persons going abroad in fulfillment of some official trust or duty, and in such cases is necessary as a certification of the bearer's public character."

Mr. Olney, Sec. of State, to Mr. Wagner, Nov. 25, 1895, 206 MS. Dom. Let. 200.

"The Department does not question the exigency which required the employment of a bearer of despatches, the legation necessarily being the best judge on this point, but any document given him by the legation for his safe conduct was not, properly speaking, a passport, if he was not an American citizen, and no fee was charged, as

appears to have been the case. The law, section 4076, Revised Statutes, forbids the issuing of a passport to any one who is not a citizen of the United States, and it is not permissible to issue one without collecting the fee. (See Secretary Sherman's decision, page 25, 'The American Passport.')"

Mr. Hay, Sec. of State, to Mr. Storer, No. 313, March 25, 1901, MS. Inst. Spain, XXIII. 117.

"Special passports are not to be issued by our agents abroad, and no passport whatever is to be issued without collecting the fee of one dollar required by law."

Mr. Hay, Sec. of State, to Mr. Storer, No. 313, March 25, 1901, MS. Inst. Spain, XXIII. 117.

Mr. A. Dudley Mann having complained of the refusal of the Russian legation in Paris to visé his passport, Mr. Everett said:

"As you had no despatches for Russia, the President entirely approves your conduct in not claiming any favor as a bearer of despatches, although you were in possession of a passport in that capacity. Some looseness of practice has crept in, with reference to passports of this kind, of an injurious tendency. Originally given to those actually charged with despatches, they have been retained for ordinary use after the despatches have been delivered at their destination. This circumstance has sometimes given an unreal character to these passports, which tends to impair their value in the hands of those entitled to them, besides being objectionable in other respects."

Mr. Everett, Sec. of State, to Mr. Mann, Dec. 13, 1852, 41 MS. Dom. Let. 138.

## IX. LOCAL PAPERS.

### 1. EUROPEAN COUNTRIES.

#### § 529.

The meaning and interpretation of section 163, Consular Regulations, "seems very plain and obvious. In cities or towns in Germany where, for purposes of identification, sojourning foreigners are required by the local laws or municipal regulations to deposit their passports with the police or other local authorities, as is understood to be the case in Hamburg, Berlin, and generally in cities and towns throughout Germany, 'a consular certificate may be granted setting forth the facts *as appearing from the passports*, but only with a view of complying with the law or regulation.'

"The person seeking such certificate there must present to the consul a passport, and the passport must not be over two years old. The certificate should be confined in its statements to 'the facts appearing from the passport.' It should also state the time at which it (the certificate) will cease to be effective, which time is to be limited by the date at which the passport will be two years old, and it should also state expressly and explicitly that it is only to be used in the locality where it is issued, and there only for the purpose of compliance with the local laws and regulations of such locality. Moreover, in no case is such consular certificate to take the place of or to be used in lieu of a passport."

Mr. Frelinghuysen, Sec. of State, to Mr. Sargent, July 26, 1883, MS. Inst. Germ. XVII. 293.

"No passport is good in Russia for more than six months, and must then be replaced by a Russian local permit to reside  
**Russia.** or travel, renewable from time to time, and always liable to be demanded by local officials or hotel keepers."

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, No. 14, May 10, 1887, MS. Inst. Turkey, IV. 573.

For a case of the arrest of an American citizen in Russia, with a passport, for having failed to exchange his passport for a Russian permit in the first province of the Empire which he entered, see Mr. Frelinghuysen, Sec. of State, to Mr. Hunt, No. 7, July 22, 1882, MS. Inst. Russia, XVI. 287.

The American consul at Beirut, having protested against the  
**Turkey.** Turkish regulation requiring local passes or *teskéréh*, to be obtained for traveling in the interior, under penalty of a fine of two Turkish *livres*, or about 8 cents, as an annoyance to travelers as well as an infraction of Art. IV. of the treaty of 1830, the Department of State said:

"It is probable that in Turkey the variety of languages and races to be found in her dominions renders a foreign passport, which is in a language utterly unintelligible to local officials in districts remote from Constantinople, much less efficient and useful in protecting travelers than a Turkish *teskéréh*, with familiar language, seals, and signatures. Such a document may fairly be considered as a *safe conduct*, and on the ground of personal safety alone it might be wiser for travellers to take pains to inform themselves of the rules enforced in Turkey and waive the slight annoyance and expense attendant on observing them, in consideration of the additional feeling of security therefrom. . . . Article I. of the treaty [of 1830] says: 'On both sides travelling passports shall be granted.' . . . The small penalty exacted for the absence of a *teskéréh* is not applied as the result of a trial by court, but is merely a police regulation. The consul

says that other powers have acquiesced in these passport regulations, and it might be better, as long as there is no national discrimination in the treatment of our citizens, to reserve the enforcement of our judicial privileges for graver questions. The enlightened city of Berlin enforces a fine against any one, whether foreigner or citizen, who, after being twice summoned, neglects to appear in person with their papers at the police office, and a third summons renders the delinquent liable to imprisonment. The theory of foreign governments is that stringent passport regulations protect innocent travellers against troublesome mistakes in identity for guilty ones or from other annoyances to which strangers are everywhere liable.

"It might, however, be well for you when, in your judgment, a favorable opportunity offers, to represent to the Turkish Government that while our countrymen are scrupulously desirous of observing all the laws and ordinances of the countries in which they travel, yet that it is hoped that some mitigation would be acceptable of the present Turkish passport regulations, which are found to be oppressive for citizens of a country so distant as our own, and to persons so little accustomed to any travelling restraints.

"You may suggest, for instance, that the visé of the consul at the last port should be dispensed with, and the fine remitted in cases where through ignorance of regulations the local *teskéréh* has not been procured. It would also perhaps be useful to our citizens if your legation and the consulates in Turkish dominions could have a translation of the Turkish passport regulations printed in good sized type, to be displayed in a conspicuous place for the benefit of our travellers."

Mr. Bayard, Sec. of State, to Mr. Straus, min. to Turkey, No. 14, May 10, 1887, MS. Inst. Turkey, IV. 573.

"The requirement of Turkish *teskéréhs* for traveling Americans, of which you complain, is not regarded by the Department as unreasonable, in view of the general inability of the native Turk to comprehend the purport of a United States passport. Such travel permits are recognized in China and Japan, and the laws of some European and South American countries require locally issued certificates for traveling or sojourning foreigners."

Mr. Uhl, Acting Secretary, to Mr. Metheny, March 8, 1895, 201 MS. Dom. Let. 103.

In consequence of the Armenian troubles, the Turkish Government suspended for a time the authority of the *teskéréh* office or bureau at Constantinople to issue travel permits for the interior on a consular application, and required an *iradé* to be obtained from the palace. In November, 1898, however, the former practice was restored, and a

notice was issued that foreigners desiring to travel in the Empire might "in future obtain local passports on producing an *ilmu-haber* (application) from the consulate of their country, setting forth their identity, the object of their journey, the places to which they wish to go, as well as the approximate duration of the stay they intend making."

For. Rel. 1898, 1100.

The requirement that a foreigner traveling in Turkey must have a Turkish *teskéréh*, or travel permit, "has been in force for many years, and as long as it is not abused is no doubt a very sensible and proper police regulation, as few if any of the Turkish agents can read either English or French."

Mr. Leishman, *mla.* to Turkey, to Mr. Hay, Sec. of State, July 5, 1901,  
For. Rel. 1901, 523.

In October, 1900, complaint was made to the legation of the United States at Constantinople by the United States consul at Ezerum, that the Rev. Mr. Cole, an American missionary at Bitlis, was deprived of his treaty rights by the refusal of the governor-general to grant him a *teskéréh* or traveling passport. As the governor stated that he was acting under orders from Constantinople the legation asked that he be directed to issue the *teskéréh*. Such a direction was promised, and it seems to have been given, but to have been afterwards countermanded. On learning this fact, Mr. Leishman, the American minister, authorized Mr. Cole, who had then been unable to attend to his affairs in various places outside of Bitlis for nearly a year, to travel with his American passport wherever his duty or interests might require, always taking care to advise the governor of his movements, and informed the Porte that he should hold the Government responsible for Mr. Cole's safety and strictly accountable for any damage, annoyances, or inconveniences which he might suffer. It seems that the course of the Turkish officials was due to Mr. Cole's active interest in the Armenian cause.

For. Rel. 1901, 523-529.

## 2. AMERICAN COUNTRIES.

### § 530.

"It sometimes happens in Spanish-American countries that an alien is required to deposit his passport with the legation or a consulate and receive a certificate of registry according to local formula."

Mr. Adée, Acting Sec. of State, to Mr. Terres, Sept. 26, 1893, For. Rel. 1894, 346.

"I have to acknowledge the receipt of your No. 33 of the 2d instant. You therein call attention to the general **Argentine Republic.** use by all foreign consuls at Buenos Ayres, excepting the consul of the United States, of forms of certificates of nationality, known as "papeletas," and you state that under the regulations governing the mobilization of the national guard the police have authority to arrest persons not reporting for duty unless they present a "papeleta" evidencing the fact of foreign birth or citizenship, which being the only form of certificate known or accepted by the police, is considered preferable to a regularly viséd passport. You inclose the forms of certificates used by the foreign consuls and recommend, in view of their general use, the adoption of some such certificate for your legation and our consulate at Buenos Ayres. You also ask, in the event of the adoption of such form, for instructions as to its use, and request information on several points which relate to the subject.

"The proposed form which you inclose (inclosure No. 4) is quite inadmissible. It is simply a passport in Spanish. There are only two ways of certification of American citizens available:

"(1) Deposit of regular passport in the legation or consulate and the issuance to the bearer of a certificate of such deposit and of his registration in the legation or consulate. The French form (inclosure No. 2 to your dispatch) might serve.

"(2) Indorsement on the passport itself of a certificate in Spanish. A Spanish translation of the following form might be used:

The within passport, issued by ———, dated ———, attests that ——— is a citizen of the United States of America, and as such is entitled to the rights and privileges of such a citizen in a foreign country.

Seen and noted in this legation (or consulate).

Good for all the territory of the Argentine Republic.

"No person can receive a certificate of citizenship in lieu of a passport. Whatever certificate is given must be predicated upon a regular passport."

Mr. Gresham, Sec. of State, to Mr. Buchanan, mln. to Arg. Rep., No. 24, Aug. 15, 1894, For. Rel. 1894, 19. See *infra*, § 542.

The laws of Guatemala requiring all foreigners to be registered as such and to produce evidence of their alienage in the **Guatemala.** form of a passport, or a certificate from the diplomatic or consular representative of the country to which they belong, the minister of the United States, who was then charged with the protection of Chinese in Guatemala, was instructed that the diplomatic and consular officers of the United States, it being understood that they were not acting as representatives of China, and therefore could not grant original certificates of Chinese citizenship, might, with the



concurrence of the Guatemalan minister for foreign affairs, certify substantially as follows: "That ——— claims to be a subject of His Majesty the Emperor of China, resident in Guatemala, and that upon proving his status as such Chinese subject, he is under the protection of the Government of the United States and entitled to the good offices of the diplomatic and consular officers thereof in case of need, in pursuance of an understanding between the Governments of Guatemala and China to that end."

For. Rel. 1896, 379-380.

"The fee of \$4 prescribed for the issuance of the Haytian certificate of travel and residence is presumably what is objected to by persons resorting to Hayti, but as this is a purely municipal tax imposed indiscriminately, there is no ground for contesting it."

Hayti.

Mr. Uhl, Acting Sec. of State, to Mr. Terres, Aug. 24, 1894, For. Rel. 1894, 347.

Mr. Stuart, minister of the United States at Montevideo, reported, April 9, 1897, that, in view of the civil war then raging in Uruguay, he had issued to various citizens of the United States "protection papers" in the following form:

Uruguay.

LEGATION OF THE UNITED STATES,

Montevideo, ——— (date).

*To whom it may concern:*

This is to certify that the bearer, ——— (name) ———, is a citizen of the United States, and is entitled to protection as such.

Description: Age, ——— years; height, ———; eyes, ———; nose, ———; mouth, ———; hair, ———; complexion, ———.

[Red seal of legation.]

(Official signature.)

The Department of State replied:

"It is supposed that these certificates of protection are required by the local authorities in pursuance of some rule of registration or matriculation such as prevails in the various Spanish-American countries.

"The question of the issuance of such certificates came up for consideration in 1894, when Minister Buchanan reported the custom of the foreign consuls at Buenos Ayres to issue forms of certificates of nationality known as 'papeletas' in consequence of the regulations governing the mobilization of the national guard, under which the police had authority to arrest persons not reporting for duty unless they presented a 'papeleta' evidencing the fact of foreign birth or citizenship, which, being the only form of certificate known to or accepted by the Argentine police, was considered preferable to a regular viséed passport. Those papeletas were required to be in the Spanish tongue, and Mr. Buchanan submitted a proposed form for

the stated purpose. The Department ruled that any form which originally certified the fact of citizenship was quite inadmissible, being simply a passport in the Spanish language. The only certificate of citizenship issued by the United States is a passport, and the giving of any document of the nature or in lieu of a passport is not authorized. Mr. Buchanan was instructed that only two ways of certification or matriculation of American citizens were available—either (1) deposit of the regular passport in the legation or consulate and of his registration in the legation or consulate, or (2) indorsement on the passport itself of a certificate in Spanish to the effect that the within passport attests that A. B. is a citizen of the United States of America, and as such is entitled to the rights and privileges of such a citizen in a foreign country.

"In view of this rule, the Department can not approve the 'protection papers' which you report having given to the fourteen persons named. They should have applied for and received regular passports. If a further protection paper in Spanish is needed, the form prescribed for use in the Argentine Republic might conveniently be followed by you upon the deposit of the regular passport in the legation or a consulate of the United States, such certificate being given free of charge. The form so authorized is as follows:

"El infrascrito ——— consul de los Estados Unidos de America, en ——— certifica que ——— esta matriculado en este consulado como ciudadano de los Estados Unidos de America, y que es portador del pasaporte No. ——— firmado por ———.

"Filiacion: Edad ———; estatura ———; frente ———; ojos ———; nariz ———; boca ———; barba ———; pelo ———; tez ———; cara ———.

"Firma del portador:

"———.

"No. ———."

Mr. Sherman, Sec. of State, to Mr. Stuart, min. to Uruguay, May 25, 1897,  
For. Rel. 1897, 593, 594.

### 3. CHINA.

#### § 531.

In China three different kinds of documents, in the nature of passports, are to be distinguished—passports, travel certificates, and transit passes.

Passports are issued by the American minister, in the usual form.

Travel certificates are issued by the consuls, in order to satisfy the requirements of the local authorities.

Transit passes are issued for the exportation of native produce, in order to avoid the likin exactions.

Owing to the long distances and the difficulty oftentimes of communicating with Peking, the custom grew up in China of sending to the

consuls blank passports, signed and sealed by the minister, to be issued as occasion arose. This custom was approved by the Department of State, in its No. 79, of Sept. 11, 1876, to the American minister in China. In 1884, however, the practice was discontinued, and all blank passports entrusted to the consuls were recalled by the legation, under instructions of the Department of State.<sup>a</sup>

In view of the difficulty an applicant for a passport might encounter in China, at places remote from a consular office, in executing the oath prescribed by the Department of State's passport circular of Feb. 23, 1887, as a condition of the issuance of a passport, Mr. Denby, then American minister at Peking, suggested a form of certificate, to be signed in the presence of a witness, in places where no consular officer was accessible. This form, with certain modifications, was approved.<sup>b</sup>

In 1890, instructions were given to require the attestation of two witnesses, instead of only one.<sup>c</sup>

In terminating the practice under which passports were issued by the American consuls in China, the Department of State took steps to authorize the issuance by consuls of travel certificates, in conformity with the system in vogue under the stipulations of Art. IX. of the British treaty of 1858, the benefits of which the United States invoked under the most-favored-nation clause. By this treaty British subjects may "travel, for their pleasure or for purposes of trade, to all parts of the interior, under passports which will be issued by their consuls, and countersigned by the local authorities."<sup>d</sup>

"These so-called passports, issued under the British treaty, . . . are not passports in the international sense, but local certificates or passes granting permission to the bearer thereof to go into the interior from the treaty port where they are issued.

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<sup>a</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, No. 370, Jan. 19, 1885, MS. Inst. China, III. 681, referring to instruction No. 342, by which the discontinuance was ordered.

<sup>b</sup> Mr. Bayard, Sec. of State, to Mr. Denby, No. 225, Aug. 24, 1887, MS. Inst. China, IV. 300.

<sup>c</sup> Mr. Blaine, Sec. of State, to Mr. Denby, min. to China, No. 523, May 6, 1890, For. Rel. 1890, 182. See Mr. Denby's No. 1058, Feb. 26, 1890, and No. 1061, March 6, 1890, For. Rel. 1890, 174, 175. Accompanying Mr. Blaine's No. 523, of May 6, 1890, For. Rel. 1890, 182, is a circular of the Department of State to the consuls in China, of May 1, 1890, which is cited in Mr. Gresham, Sec. of State, to Mr. Grip, Swedish & Nor. min., Oct. 7, 1893, MS. Notes to Sw. & Nor. VII, 530:

"I have to acknowledge the receipt of your dispatch No. 23, of the 10th of August last, reporting that the Chinese Government has instructed its officials at Canton to recognize American passports issued by our diplomatic and consular officers outside of China who are authorized to issue such documents. The consuls at Hongkong and Canton have been informed by the Department of this satisfactory disposition of the matter." (Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 62, Oct. 15, 1898, MS. Inst. China, V. 611.)

<sup>d</sup> 48 Brit. and For. State Papers, 49.

"These certificates derive their validity from joint issuance by the consul and the local Chinese authority, but the initiative in issuing them belongs to the consul, and the Chinese cannot refuse to counter-sign them.

"These certificates are moreover not merely temporary and local, but are limited to the particular journey to be undertaken in China. When the specified time expires, or the journey is performed, the certificate loses validity and another must be issued if the bearer wishes to continue in the interior or make another journey thither.

"All this points to an instrument which supplements an ordinary general passport which every nation has the independent right to issue to its subjects and which other nations may disregard at their peril.

"The Chinese certificates are at the most merely transit passes.

"We have, however, decided many times that no such pass or certificate, which carries on its face recognition of the bearer's nationality, can be issued in lieu of a regular passport as prescribed by statute.

"It is not, however, to be expected that an American citizen is to be required to take out a new passport every time he journeys more than 30 miles inland from a treaty port, and be compelled to pay \$5.00 each time.

"The true solution would seem to be to provide for the issuance by the consuls of a form of limited transit certificates, but only on presentation of a passport previously issued by the legation, or upon filing a duly attested application for a passport, with evidence of citizenship, accompanied by the legal fees.

"An American citizen's rights, once established, would entitle him to a transit pass from the consul, in conformity with the British treaty, without the necessity of referring the application to the legation, and without the necessity of paying a new passport fee each time.

"To avoid the difficulties and delays complained of, and which are shown to be excessive, the transit certificate may be given when the formalities for a legal issue of a passport have been complied with.

"The passport, when issued by the legation, could be sent to the consul, to be by him retained as his warrant for the issuance of the certificate or transit pass until the party returns. In case the legation refuses to issue a passport the consul should notify the local authorities that the certificate is cancelled. The knowledge that the certificate is liable to be so cancelled would seem to be a sufficient safeguard against *mala fides* in applying for one.

"In order that there may be uniformity of action, you are instructed to prepare a form of consular travel certificate (to be put

into Chinese and printed in parallel columns), and submit the draft thereof for the consideration and action of this Department."

Mr. Frellinghuysen, Sec. of State, to Mr. Young, min. to China, No. 379, Jan. 19, 1885, MS. Inst. China, III. 681.

"I have received your No. 22, of May 15 last, accompanied by a form of consular travel certificate, in the English and Chinese languages, to be issued to American citizens desiring to visit the interior of China, such certificates to be good for one year, and in every case where the particular journey is not stated, the number of provinces in which the holder may travel is to be restricted to five. 'In case any of our citizens,' you say, 'should desire to make an exceptional journey, a special pass should in every instance be obtained.'

"Your dispatch has, accordingly, had attentive consideration and the amendments suggested by you appear to meet the case fully. The certificate system, with the checks and restrictions now imposed, may be put into operation."

Mr. Bayard, Sec. of State, to Mr. Smithers, chargé, No. 448, July 15, 1885, MS. Inst. China, IV. 63.

"Your opinion that travel certificates, when issued by consuls to parties who have applied for passports, but who are anxious to depart on a journey into the interior before their application can be acted upon by your legation, should be limited to be good only for such journey, was fully set forth in your No. 1018 of December 30, 1889, and has already received the approval of the Department in its instruction No. 498 of February 20, 1890.

"In cases, therefore, where travel certificates are required by the local authorities they may be issued by United States consuls in China to two classes of persons:

"(1) Those who possess American passports; and,

"(2) Those who have actually and regularly applied for such passports.

"No objection is now perceived to the continuance of the present practice of issuing to those who come within the first of these categories travel certificates good for one year; and great hardships might, as pointed out in Mr. Smithers's No. 22 of May 15, 1885, be imposed upon them, especially when engaged as missionaries at a distance from any consulate, by the adoption of any other rule.

"But with regard to the second class, where of necessity the validity of the travel certificate is conditioned upon the subsequent issuance of the passport, it is eminently proper that the efficacy of the certificate should be narrowly restricted. It is therefore deemed advisable that the certificate issued to such parties should be ex-

pressed to be good only for the particular journey, and not longer than one year."

Mr. Blaine, Sec. of State, to Mr. Denby, mln. to China, No. 523, May 6, 1890. For. Rel. 1890, 182.

With this instruction there is printed a circular of the Department of State to consuls in China, of May 1, 1890, in relation to the issuance of travel certificates. The form of the certificate is annexed to the circular.

See, also, Consular Regulations of the United States, 1896. § 167, and forms 181 and 182.

The issuance of the travel certificate has been held to be an official service, for which no fee is to be charged, except under regulation of the Department of State. (Mr. Hay, Sec. of State, to Mr. Conger, mln. to China, No. 188, June 24, 1890, MS. Inst. China, VI. 1.)

In 1893 and 1894 Mr. Denby, then American minister at Peking, conducted, as dean of the diplomatic corps, a correspondence with the Tsung-li-Yamên, concerning its request that the foreign representatives devise a plan whereby foreigners traveling in China should be required to report in person to the magistrates through whose jurisdiction they might pass. In a note to the Tsung-li-Yamên, Mr. Denby stated that it would be impracticable for all foreigners when traveling in China to make such a report in person, and that the penalty suggested, that of a failure of protection, was by no means admissible. A more serious objection, however, and one which was considered insuperable, was that the proposed change would materially impair the rights of the powers under Art. IX. of the British treaty of 1858. By that article, the passports issued thereunder, "if demanded, must be produced for examination in the localities passed through. If the passport be not irregular, the bearer will be allowed to proceed." Article XVIII. of the same treaty provides that the Chinese authorities "shall, at all times, afford the fullest protection to the persons and property of British subjects." As the request of the Chinese Government would involve a change in these treaties, the foreign representatives were without power to comply with the Government's request.

The Tsung-li-Yamên, in reply, maintained that its proposal was clearly in conformity with the provision that passports, if demanded, must be produced for examination, and that, if the passport was not irregular, the bearer would be allowed to proceed. The examination of passports as provided by the treaty was, said the Yamên, "the same as reporting in person to the authorities."

From this position the diplomatic corps dissented, their contention being that by the treaties passports need only be shown when an examination of them was properly demanded, while under the Chi-

nese construction travelers would be compelled to seek out the local authorities in every city and report to them. The Yamèn alleged that foreigners had sometimes secretly withheld their passports when requested to show them, and that they had also recklessly gone into the interior without passports. The diplomatic corps replied that such conduct was disapproved by the foreign representatives; and suggested that if the prince and ministers should adopt some regulation in regard to the exhibition of passports to the principal authorities, on demand, in district or prefectural cities, the foreign representatives would consider it carefully, and, if it was approved, would make it known to travelers through the consuls and enjoin compliance with it.

For. Rel. 1893, 241, 244; For. Rel. 1894, 152-160.

The discussion was renewed in 1897. Mr. Denby, in a note to the Tsung-li Yamèn, July 12, 1897, again maintaining the rights of the powers under the British treaty of 1858, said:

"The passports should state the names of the provinces in which the bearer thereof proposes to travel. It is impracticable to state the route that he will follow. . . .

"Different systems prevail in the various countries as to issuing passports. Under our system the passports are issued by the minister only. They are sent to you and are countersigned by the governor of the city of Peking. . . . Article 9, above cited, states that 'passports will be issued by their consuls [meaning British consuls] and countersigned by the local authorities.' As our consuls do not issue passports, this phrase has no application to us." (For. Rel. 1897, 104.)

The position maintained by the diplomatic corps in 1893-1894 is reaffirmed in Mr. Hay, Sec. of State, to Mr. Conger, min. to China, No. 260, May 8, 1900, MS. Inst. China, VI. 72.

Transit passes, for the protection from likin taxes of goods purchased in the interior of China by foreigners, are issued by the superintendent of the Imperial Maritime Customs at the port of exportation to merchants who apply for them through their respective consulates and give the prescribed bond. The goods, on arriving at the port of exportation, are examined by the customs officials and one-half of the export duties are paid by the shipper, after which the goods are ready for exportation, which must take place within six months. If not exported within that time, the merchant must pay the customs a sum equivalent to two and one-half times the export duty, after which he is released from the obligation to export. This is the procedure at Canton, and it is understood to be similar at other Chinese ports. No consular fee is charged for obtaining the pass, or for authenticating the export bond. In applying for a pass, the consul must be satisfied that the merchandise is actually the property of the American citizen in whose name the pass is to be issued.

No special form of power of attorney is required to enable the agent in China of an American citizen to procure a pass.

Mr. Cridler, Third Assist. Sec. of State, to the Seeger & Guernsey Co., May 25, 1900, 245 MS. Dom. Let. 287.

See as to practice at other times and places, Mr. Denby, min. to China, to Mr. Blaine, Sec. of State, No. 1114, May 10, 1890, For. Rel. 1890, 184. The Chinese authorities were then endeavoring to restrict the time during which a transit pass remained in force, in consequence of the presentation of a pass issued 12 years before at Tientsin, which, as it turned out, had not been included among the ports where the life of a pass was limited. A note of the Tsung-li Yamén, of May 10, 1890, printed with Mr. Denby's dispatch, states the periods of limitation established at various ports.

Much fraud has been practiced in the use of such passes. (Mr. Adee, Second Assist. Sec. of State, to Mr. Smith, No. 13, April 20, 1899, 167 MS. Inst. Consuls, 1.)

The habit "of obtaining transit passes by American citizens for Chinese principals, to secure for them advantages to which they are not entitled by the laws of their own country, is such an abuse of the privilege as not only to justify the Chinese authorities in refusing to recognize such passes when irregularly issued or obtained, but also in declining to grant additional ones to those found guilty of such practices." (Mr. Frelinghuysen, Sec. of State, to Mr. Young, min. to China, Aug. 8, 1884, MS. Inst. China, III. 63.)

## XII. WAR REGULATIONS.

### 1. AMERICAN CIVIL WAR.

#### § 532.

By a regulation of the Department of State of Aug. 19, 1861, "no person was allowed to go abroad from a port of the United States without a passport either from this Department or countersigned by the Secretary of State, nor any person allowed to land in the United States without a passport from a minister or consul of the United States, or, if a foreigner, from his own Government, countersigned by such minister or consul."<sup>a</sup> In order to facilitate the execution of this regulation, Oscar Irving and Jonathan Amory, respectively dispatch agents at New York and Boston, were also appointed, Aug. 22, 1861, agents for the issuance of passports, and were provided with forms, signed in blank.<sup>b</sup> Sept. 12, 1861, E. L. O. Adams was appointed confidential agent of the Department of State at Portland, Me., with authority to issue passports. He was instructed, however, that the chief object of his appointment was to prevent persons in the insurgent service from going to and from Canada. Any such persons, if he knew them, or if he received a report of them from the Department of State, by letter or telegram, he was to cause to be

<sup>a</sup> Circular to Consuls, March 17, 1862, MS. Circulars, I. 194.

<sup>b</sup> 54 MS. Dom. Let. 510.



arrested and sent to Fort Lafayette, New York.<sup>a</sup> Applications for passports, from notaries and other persons, made to the Department of State, continued to receive the attention of the Department as before.<sup>b</sup> The passport agents were instructed to issue passports only on the applications of the persons desiring them; <sup>c</sup> and to issue them gratis.<sup>d</sup> Passports were not required, however, in the case of persons going to the British provinces; <sup>e</sup> but all passengers for foreign ports, except Irish and Germans of the poorer classes, were required to obtain them before leaving the country.<sup>f</sup>

Till the act of March 3, 1863, by which permits to leave the country were authorized to be given to aliens who had by the conditions of their sojourn become subject to military duty, passports were issued by the Department of State and its agents only to citizens of the United States. Aliens were required to obtain passports from their own governments or their agents. Holders of foreign passports desiring to leave the country were required to send them to the Department of State to be countersigned; but persons who had declared their intention to become citizens of the United States, if they were unable to obtain passports from the ministers or consuls of their native country, were allowed to embark without molestation, unless the chief of police at the place of embarkation should in a particular case object.<sup>g</sup> In the case of Bavarians, notarial certificates, countersigned by their consul, who had no authority to issue passports, were recognized; and instructions were given to make a like exception in any similar case.<sup>h</sup> Nov. 25, 1861, notice was given of the discontinuance of the practice of requiring foreign passports to be countersigned, or viséed at the Department of State, and the duty was delegated to the passport agents.<sup>i</sup> The American consul-general at

<sup>a</sup> Mr. Seward, Sec. of State, to Mr. Adams, Sept. 12, 1861, 55 MS. Dom. Let. 85.

<sup>b</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Van Nostrand, Sept. 7, 1861, 55 MS. Dom. Let. 45.

<sup>c</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Nones, Oct. 9, 1861, 55 MS. Dom. Let. 229.

<sup>d</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Irving, Aug. 29, 1861, 54 MS. Dom. Let. 562; to Mr. Nones, Oct. 9, 1861, 55 id. 229; Mr. Seward, Sec. of State, to Mr. Amory, Nov. 25, 1861, 55 id. 490.

<sup>e</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Van Nostrand, Sept. 7, 1861, 55 MS. Dom. Let. 45.

<sup>f</sup> Mr. Seward, Sec. of State, to Mr. Amory, Oct. 21, 1861, 55 MS. Dom. Let. 284; to Mr. Prescott, Nov. 2, 1861, id. 419; to Sec. of Treas., Dec. 2, 1861, id. 534.

<sup>g</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Sprungk, Aug. 22, 1861, 54 MS. Dom. Let. 515; to Mr. Robbins, Aug. 29, 1861, id. 563; to Mr. Irving, Aug. 29, 1861, id. 562; to Mr. Graham, Aug. 31, 1861, id. 583.

<sup>h</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Kennedy, chief of police at New York, Jan. 17, 1862, 56 MS. Dom. Let. 214.

<sup>i</sup> Mr. Seward, Sec. of State, to Mr. Amory, Mr. Irving, and Mr. Adams, Nov. 25, 1861, 55 MS. Dom. Let. 490, 491, 493.

Montreal was authorized to visé the passports of British subjects leaving Canada for the United States,<sup>a</sup> and in January, 1862, measures were adopted in Canada to restrict the issuance of certificates of British nationality, having the force of passports, to the governor-general and his authorized agents, thus taking the power from mayors of towns, who had previously assumed in some instances to exercise it.<sup>b</sup> The agents of the United States were enjoined to take special care against the illegal transfer of foreign passports from one person to another.<sup>c</sup> Collectors of customs were desired to aid in the enforcement of the passport regulations.<sup>d</sup>

A regulation required the "loyalty of all Americans applying for passports or visés to be tested under oath." The enforcement of this regulation was specially enjoined;<sup>e</sup> but, on March 17, 1862, it was rescinded.<sup>f</sup>

Dec. 2, 1861, it was ordered that passports should no longer be required of passengers proceeding from New York by steamer to California, Oregon, or Washington, via the Isthmus.<sup>g</sup> The general strictness, however, with which the rules were sought to be enforced may be inferred from the fact that special instructions were given to allow Col. Rowan, a British officer, who had been accustomed to visit British mail steamers, in the service of his government, to continue to exercise that function.<sup>h</sup>

The passport agencies at New York, Boston, and Portland were discontinued Feb. 24, 1862, and the function of issuing passports to American citizens was exclusively resumed by the Department of State.<sup>i</sup>

<sup>a</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Adams, Nov. 27, 1861, 55 MS. Dom. Let. 507. The consul-general was not allowed to charge for the service. (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Amory, Feb. 6, 1862, 56 MS. Dom. Let. 306.)

<sup>b</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Adams, and to Mr. Amory, Jan. 28, 1862, 56 MS. Dom. Let. 254.

<sup>c</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Adams, and to Mr. Amory, and Mr. Irving, Dec. 14, 1861, 56 MS. Dom. Let. 44, 45, 46.

<sup>d</sup> Mr. Seward, Sec. of State, to Sec. of Treas., Dec. 12, 1861, 56 MS. Dom. Let. 28.

<sup>e</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Irving, Jan. 3, 1862, 56 MS. Dom. Let. 150. In the case of Mr. W. H. Richardson instructions were given, on receiving "satisfactory assurances of his loyalty," to issue a passport without requiring him to take the usual oath of allegiance. (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Amory, Feb. 8, 1862, 56 MS. Dom. Let. 322.)

<sup>f</sup> Circular to consuls, No. 9, March 17, 1862, MS. Circulars, I. 194.

<sup>g</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Kennedy, chief of police of New York, Dec. 2, 1861, 55 MS. Dom. Let. 534.

<sup>h</sup> Mr. Hunter, chief clerk, to Mr. Kennedy, Dec. 9, 1861, 56 MS. Dom. Let. 1.

<sup>i</sup> Mr. Seward, Sec. of State, to Mr. Irving, to Mr. Amory, and to Mr. Adams, Feb. 21, 1862, 56 MS. Dom. Let. 392, 393, 394; also, Mr. F. W. Seward, Assist. Sec. of State, to Mr. Amory and Mr. Irving, Feb. 27, 1862, id. 415, 416.

Feb. 27, 1862, the agents of the Department of State, at New York and Boston, were instructed that the order requiring passports of all persons departing from or arriving in the United States was rescinded, as well as the rule requiring the countersignature, or visé, of foreign passports.<sup>a</sup>

Similar instructions were given to the agent at Portland, March 12, 1862.<sup>b</sup>

"Until further notice, however, arrests will be made under the direction of the Secretary of War of any persons who may reasonably be suspected of treason against the United States."<sup>c</sup>

March 17, 1862, a circular notice was sent out that the regulation of Aug. 19, 1861, was rescinded.<sup>d</sup>

August 8, 1862, the diplomatic and consular officers of the United States were instructed till further notice not to issue passports to any citizens of the United States, between the ages of 18 and 45 years, and otherwise liable to perform military duty, whom they should have reason to believe to have left the United States after that date.<sup>e</sup>

Persons going abroad, who were liable to a draft, were required, in accordance with the regulations of the War Department, to give bonds, conditioned for the performance of military duty, in case they should be drafted, or the providing of a substitute.<sup>f</sup>

Sept. 27, 1862, it was stated that, under a "recent regulation," a passport could include only the applicant, his wife, and minor children.<sup>g</sup>

Under the act of March 3, 1863, authorizing the issuance of permits to quit the country to aliens who had become subject to military duty, a passport for such a person was on a certain occasion sent to Mr. Irving, the dispatch agent at New York, with instructions to hand it over on receiving from the applicant an affidavit that he was "an

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<sup>a</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Irving, and to Mr. Amory, Feb. 27, 1862, 56 MS. Dom. Let. 415.

<sup>b</sup> Mr. F. W. Seward, Assist. Sec. of State, to Mr. Adams, March 12, 1862, 56 MS. Dom. Let. 486.

<sup>c</sup> Mr. Seward, Sec. of State, to Lord Lyons, Brit. Min., March 7, 1862, MS. Notes to Gr. Br. IX. 131.

<sup>d</sup> Circular No. 9, to U. S. consuls, March 17, 1861, MS. Circulars, I. 194. See, also, Mr. Seward, Sec. of State, to Mr. Harvey, min. to Portugal, No. 43, March 20, 1862, MS. Inst. Portugal, XIV. 239.

<sup>e</sup> Mr. Seward, Sec. of State, Circular No. 18, Aug. 8, 1862, MS. Circulars, I. 204.

<sup>f</sup> Mr. Seward, Sec. of State, to Mr. Fessenden, Sept. 27, 1862, 58 MS. Dom. Let. 271; Mr. Hunter, chief clerk, to Mr. Butler, Sept. 16, 1862, *id.* 219. "Bonds are not *now* required from citizens . . . in those States which have furnished their complement of militia for nine months." (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Weiss, March 23, 1863, 60 MS. Dom. Let. 70; to Mr. Hale, March 24, 1863, *id.* 79.)

<sup>g</sup> Mr. Seward, Sec. of State, to Mr. Fessenden, Sept. 27, 1862, 58 MS. Dom. Let. 271.

able-bodied person liable to military duty; that he is between the ages of 20 and 45 years, of foreign birth, and has declared his intention to become a citizen of the United States, according to law, and has not been convicted of felony," besides a bond conditioned for the performance of military duty.

Mr. F. W. Seward, Act. Sec. of State, to Mr. Irving, Aug. 18, 1863, 61 MS. Dom. Let. 412.

On the ground that persons aiding the rebellion or engaged in the slave trade had embarked at foreign ports for ports in the loyal States, and on arriving at such ports had engaged in unlawful practices, seizing unarmed merchant vessels, carrying on forbidden trade, and furnishing information, arms, munitions and other aid and comfort to the insurgents, the diplomatic and consular officers of the United States were instructed, May 25, 1864, that thereafter all persons, both citizens and foreigners, embarking for the United States, except emigrants, must provide themselves with passports, and, if arriving without them, would be liable to examination as to their character and purposes. This regulation did not apply to "loyal citizens who reside within loyal States, and who pass through foreign countries or provinces, not having come from any port beyond the seas."

Mr. Seward, Sec. of State, to Dip. & Consular Officers, circular, May 25, 1864, MS. Circulars, I. 270.

Mr. Seward, as Secretary of State, issued, Dec. 17, 1864, the following circular order:

"The President directs that, except immigrant passengers directly entering an American port by sea, henceforth no traveler shall be allowed to enter the United States from a foreign country without a passport. If a citizen, the passport must be from this Department or from some United States minister or consul abroad; and, if an alien, from the competent authority of his own country, the passport to be countersigned by a diplomatic agent or consul of the United States.

"This regulation is intended to apply especially to persons proposing to come to the United States from the neighboring British provinces. Its observance will be strictly enforced by all officers, civil, military, and naval, in the service of the United States, and the State and municipal authorities are requested to aid in its execution. It is expected, however, that no immigrant passenger, coming in manner aforesaid, will be obstructed, or any other persons who may set out on their way hither before intelligence of this regulation could reasonably be expected to reach the country from which they may have started."

Circular No. 55, MS. Circulars, I. 281.

The circular was accompanied with the following rules:

- " I. Passports for Canada and the adjoining British provinces are issued for one year, and need not be surrendered within that period.
- " II. Citizens of the United States, desirous of visiting Canada, may take out their passports either from United States consulates or from this Department.
- " III. United States consular agents are authorized to issue passports, and may countersign those of foreigners.
- " IV. Travelers making transit through Canada, from one American port to another American port, must procure passports.
- " V. Persons residing near the line who desire to cross and recross daily in pursuit of their usual avocations are 'travelers' in the contemplation of the order, and must provide themselves with passports.
- " VI. Females and minor children traveling alone are included in the order. When, however, husband, wife, and minor children travel together, a single passport for the whole will suffice. For any other person in the party a separate passport will be required.
- " VII. Should any person, native or foreign, clandestinely enter the United States in derogation of the order, the fact should be reported to the military authorities of the district."

In connection with these rules, see Mr. Seward, Sec. of State, to Mr. Fessenden, Sec. of Treas., Dec. 29, 1864, 67 MS. Dom. Let. 425; F. W. Seward, Assist. Sec. of State, to Mr. Spalding, Dec. 27, 1864, id. 401; same to Messrs. Snow & Co., Jan. 12, 1865, id. 529.

"For your information I send herewith a copy of the new tariff of consular fees. The consular officers in Canada are instructed and are believed to make the same charge for passports that are made by Mr. Jackson at Halifax." (Mr. F. W. Seward, Assist. Sec. of State, to Messrs. Snow & Co., Jan. 12, 1865, 67 MS. Dom. Let. 529.)

"The order in question [of Dec. 17, 1864] is designed to apply only to travelers; and persons on their way to and from church, and their respective post-offices, and in attendance on the sick, are not considered . . . to be 'travelers.'" (Mr. F. W. Seward, Assist. Sec. of State, to Mr. Gillis, Jan. 25, 1865, 68 MS. Dom. Let. 12.)

The Department of State declined to grant a request of certain firms at Champlain, N. Y., that the United States officials be instructed "to allow known and worthy inhabitants residing within the precincts of the British North American provinces, and near the boundary of the United States, to pass and repass the borders for the purpose of business transactions" with such firms, without complying with the terms of the order. (Mr. F. W. Seward, Assist. Sec. of State, to Messrs. Whiteside et al., Jan. 25, 1865, 68 MS. Dom. Let. 13.)

See, also, Mr. Seward, Sec. of State, to Sec. of War, Jan. 27, 1865, suggesting that persons in New York who violated the order be committed to military custody to be tried by court-martial. (68 MS. Dom. Let. 41.)

"Mr. Mason may be informed that no passport is needed to cross the border into Canada; passports are only required to enter the United States." (Mr. Seward, Sec. of State, to Sec. of Treas., March 1, 1865, 68 MS. Dom. Let. 314.)

Mr. Seward, as Secretary of State, issued to consular officers, March 15, 1865, the following order:

"United States consular officers residing abroad, with the excep-

tion of those resident in Canada, are required to inform all captains of American vessels, on delivery of their papers, that, in order to prevent the occasion of embarrassment on their arrival in this country, it is necessary that each and every passenger, other than emigrants, and the wife and minor children of any gentleman, accompanied by said gentleman, should be protected by a passport duly issued or countersigned, should such passenger be a citizen of this country, by a diplomatic agent or consul of the United States; but otherwise to be issued by the proper authority of the country of which they are citizens, and countersigned by a United States diplomatic agent or consular officer.

"Instructions have been issued to the collectors of the several ports of entry in the United States, advising them that in all cases where passengers arrive at any port in the United States without a proper passport, such passengers shall not be permitted to land, nor any permit be given for the landing of their baggage, until notice shall have been duly given to the United States military authorities within the district, who will dispose of such passengers and baggage under instructions from the War Department."

Circular No. 56, March 15, 1865, MS. Circulars, I. 282.

In reply to a request made by a gentleman at the University of Virginia for a passport for himself and his family, Mr. Seward, in enclosing a copy of the passport regulations, said: "As it is presumed that you have been a colonel in the service of the insurgents, pursuant to a recent order of the President, any passport which may be issued to you will contain the condition that you do not return to the United States without the President's permission. If you are a paroled prisoner, no fee will be required for the passport."

Mr. Seward, Sec. of State, to Mr. Maury, Sept. 5, 1865, 70 MS. Dom. Let., 307.

## 2. OTHER CASES.

### § 533.

"Lord Hawkesbury presents his compliments to Mr. Gore, and has the honor to inform him that it will be requisite for such citizens of the United States of America as may be desirous of proceeding from this country to France to apply for passports at the alien office, which passports will be granted gratis on their producing one from Mr. Gore."

Lord Hawkesbury, for. sec., to Mr. Gore, Am. commissioner, circular, Downing Street, Friday, June 10, 1803, Papers relative to the Commissioners under the 7th article of the Treaty with England, 1794, III., MSS. Dept. of State.

Early in December, 1901, the British War Office gave notice that, "in consequence of the establishment of martial law in all South

African ports," no person would, except under special circumstances, be allowed, on and after Jan. 1, 1902, to land in that country without a permit. This permit, in the case of persons proceeding from ports in the United Kingdom, was to be obtained from the Permit Office, 39 Victoria Street, S. W., London; and each applicant was required to produce a certificate, signed by the agent general for the Cape Colony or Natal, a Member of Parliament, Justice of the Peace, Banker, Parish Priest or Minister, or Officer of H. M. forces, that he possessed at least £100 or was in a position to maintain himself on arrival in South Africa; but subjects of foreign powers were allowed to produce satisfactory evidence to the same effect from their respective embassies or legations in London. Persons proceeding from British colonial ports were required to obtain like permits from the Colonial Secretary, or from some officer appointed by the Colonial Government; while persons sailing from a foreign port were to obtain them from the British consular officer there. In the case of a family a separate permit was required from each son or daughter over 16 years of age. The foregoing permits, it was expressly stated, were "available only to enable passengers to land in South Africa, and are no guarantee that they will be allowed to proceed inland." Permits to proceed inland were to be applied for at the port of disembarkation; and warning was given that there were "still thousands of persons waiting at the coast ports for an opportunity to return to their homes," who would "probably have precedence over later arrivals."

The London Times, weekly ed., Dec. 6, 1901, p. 778, column 4; U. S. Consular Reports, LXVIII. (Feb. 1902) 149.

"Your despatch No. 177, of the 12th ultimo, has been received. It relates to passports for United States citizens in Guatemala, which, it appears, even when issued at the legation, are required to be countersigned at the foreign office. This, no doubt, for the reasons which you assign, is an inconvenient regulation for the holders, and abstractly may scarcely be warrantable in time of peace. It seems, however, that that condition had not technically been reached at Guatemala, for even the minister for foreign affairs, in his note to you of the 10th ultimo, speaks of a decree ready for the press, raising the state of siege, or, in other words, abolishing martial law. If circumstances had required that state to continue, its usual incidents, including the countersigning of passports, may scarcely be regarded as unreasonable. If, however, the regulation should in your judgment be unnecessarily continued or vexatiously required, you will temperately protest against it as unpalatable to your Government."

Mr. Fish, Sec. of State, to Mr. Williamson, No. 97, July 24, 1874, MS. Inst. Costa Rica, XVII. 190.





